1993

United Park Associates, a Utah Limited Partnership v. Gump & Ayers Real Estate, Inc. : Brief of Appellee

Utah Court of Appeals

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Robert M. McDonald; McDonald, West & Benson; Attorneys for Defendant/Appellee.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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UNION PARK ASSOCIATES, a Utah Limited Partnership,	:	Appellate Court No. 930071-CA
Plaintiff and Appellee,	:	Priority Number 15
GUMP & AYERS REAL ESTATE, INC.,	:	
Defendant and Appellant.		

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BRIEF OF APPELLEE

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APPEAL FROM TWO SUMMARY JUDGMENTS RENDERED BY THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ANNE M. STIRBA PRESIDING.

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JURISDICTION AND NATURE OF PROCEEDINGS

1. Jurisdiction is conferred upon the Utah Court of Appeals to hear this appeal by Utah Code Ann. § 78-2a-3(2)(k) (1953 as amended).

2. This appeal is from multiple Orders of the Third Judicial District Court as follows:

(a) Granting Plaintiff's first Motion for Summary Judgment, on Plaintiff's Complaint, on the issue of Defendant's liability;

(b) Denying Defendant's Motion for Leave to Amend;

(c) Granting Plaintiff's second Motion for Summary Judgment on the issues of damages, late fees, interest and Plaintiff's entitlement to attorney's fees; and

(d) Denying Defendant's Cross-Motion for Summary Judgment on the issue of the propriety of the contract interest rate.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the Memorandum and supporting Affidavits filed by Defendant/Appellant in opposition to Plaintiff's first Motion for Summary Judgment raise a genuine issue as to a material fact to defeat Plaintiff's right to Judgment for liability against Defendant for the balance due and owing on a Promissory Note? Plaintiff's Summary Judgment was granted by the lower Court as a matter of law and is therefore subject to review for correctness by this Court. Barber vs. Farmers Ins. Exch., 751 P.2d 248 (Ut. Ct. App. 1988).

2. Did the District Court commit an abuse of its broad discretion by denying the Defendant's Motion for Leave to Amend, which Motion was totally unsupported by either Affidavits, evidentiary materials or a Memorandum, and which Motion the Court determined to be moot as a result of the Court's granting of Plaintiff's first Motion for Summary Judgment on the issue of liability? The District Court has broad discretion in matters regarding amendments to pleadings, which decisions are subject to review only for abuse of discretion. Goeltz vs. Continental Bank & Trust Co., 299 P.2d 832 (Utah 1956).

3. **Did the District Court err in granting Plaintiff's Motion for Summary Judgment on the issue of damages and denying Defendant's Cross-Motion for Summary Judgment by calculating interest under the Promissory Note on a "per annum" interest rate as required by Utah statute?** Plaintiff's Motion for Summary Judgment on the issue of damages was granted as a matter of law and is therefore subject to review for correctness by this Court. Barber vs. Farms Ins. Exch., 751 P.2d 248 (Utah Ct. App. 1988).

DETERMINATIVE RULES AND STATUTES

Rule 56, Utah Rules of Civil Procedure:

> (c) Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 4-501, Utah Code of Judicial Administration:

(1) Filing and service of motions and memoranda.

> (a) Motion and supporting memoranda. All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions,

exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(2) Motions for summary judgment.

(a) Memorandum in support of motion. The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) Memorandum in opposition to a motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

Utah Code Ann. § 15-1-3 (1953 as amended):

> Whenever in any statute or deed, or written or verbal contract, or in any public or private instrument whatever, any certain rate of interest is mentioned and no period of time is stated, interest shall be calculated at the rate mentioned by the year.

STATEMENT OF THE CASE

On November 16, 1990 the Appellee/Plaintiff, Union Park Associates (hereinafter "Union Park"), commenced the present action against Appellant/Defendant, Gump & Ayers Real Estate, Inc. (hereinafter "Gump & Ayers") (R. 2). Pursuant to its Complaint, Union Park sought recovery for the balance due and owing on a Promissory Note executed by Gump & Ayers (R. 2 and 3). On December 13, 1990, Gump & Ayers filed an Answer admitting execution and non-payment but denying liability (R. 14). Union Park answered Gump & Ayers' discovery requests on January 14, 1991 (R. 19), and filed its first Motion for Summary Judgment on February 22, 1991 (R. 50). That Motion was supported by a Memorandum of Points and Authority as well as an Affidavit filed contemporaneously therewith (R. 21 and 53). Union Park further filed an Affidavit in support of its request for attorney's fees (R. 21). Gump & Ayers received one extension of time within which to respond to the Motion for Summary Judgment, by stipulation of the parties (R. 187). Thereafter, Gump & Ayers filed a Memorandum in Opposition to the Motion for Summary Judgment on March 21, 1991 (R. 213). Gump & Ayers' response was

supported by two Affidavits (R. 189 and 207). Simultaneously with filing its Response to the Motion for Summary Judgment, Gump & Ayers filed a Motion for Leave to Amend its Answer to raise the defense of fraud in the inducement, as well as a counter-claim similarly predicated upon fraud (R. 235). Gump & Ayers' Motion for Leave to Amend was unsupported by either Affidavits or a Memorandum. Union Park filed a Memorandum in Response to the Motion for Leave to Amend (R. 263) and a Reply Memorandum in support of its Motion for Summary Judgment (R. 317). Union Park's Reply Memorandum was supported by supplemental affidavits (R. 289 and 335).

All pending Motions, including Union Park's Motion for Summary Judgment and Gump & Ayers' Motion for Leave to Amend were scheduled for hearing before the Court on November 4, 1991 (R. 431). Hearing on the aforementioned Motions was continued and ultimately held by the Court on January 10, 1992 (R. 436). At the hearing, Union Park's Motion for Summary Judgment was granted on the issue of liability. Issues of damages and attorney's fees were reserved for further proceedings (R. 471). Gump & Ayers' Motion for Leave to Amend was denied (R. 471). Due to objections to Union Park's proposed Order, the Order of the Court was not entered until August 25, 1992 (R. 449, 456, 470).

Union Park filed a second Motion for Partial Summary Judgment on the remaining issues of damages and attorney's fees on August 28, 1992 (R. 474). The Second Motion for Summary Judgment was supported by a Memorandum of Points and Authorities (R. 474) and an Affidavit of Amount Due and Owing (R. 502). Gump & Ayers obtained, by Motion, a second extension of time (R. 536), and finally filed a Memorandum and Affidavit in Response to the Motion for Summary Judgment on September 30, 1992 (R. 549 and 553). Gump & Ayers also filed a Cross-Motion for Summary Judgment on the issue of the interpretation to be given to the interest rate set forth in the Note (R. 566). On October 8, 1992, Union Park filed a Reply Memorandum in support of its Motion for Summary Judgment and in response to the Gump & Ayers' Cross-Motion (R. 574).

The Cross-Motions for Summary Judgment were heard by the Court on November 30, 1992 (R. 743). Union Park's Motion for Summary Judgment on the issues of damages and attorney's fees was granted while the Gump & Ayers' Motion for Summary Judgment on the appropriate interest rate was denied (R. 606). The present appeal ensued (R. 595).

STATEMENT OF FACTS

FACTS RELEVANT TO PLAINTIFF'S FIRST MOTION FOR SUMMARY JUDGMENT

Appellant has not separately numbered its Statement of Facts, which cannot therefore be specifically identified for purposes of

objection; and numerous "factual" statements are essentially legal conclusions, as Appellant presumes ultimate findings, such as fraud. Consequently, Appellee objects to Appellant's Statements of Fact in total, and hereby states the relevant facts to the issues on appeal.

1. Union Park is the owner of a commercial office building located at 5925 Union Park Center, Midvale, Utah, which premises shall hereinafter be referred to as the "Subject Premises" (R. 31).

2. On June 1, 1983, Union Park as landlord and Gump & Ayers as tenant entered into and executed a Lease Agreement (Lease Number 290), pertaining to office space on the second floor of the Subject Premises (R. 31 and 66).

3. Pursuant to Lease Number 290, Gump & Ayers leased 4,497 square feet of office space for a period of ten years beginning March 1, 1984 (R. 31 and 216).

4. On June 28, 1985, Union Park as landlord and Gump & Ayers as tenant entered into and executed a second Lease Agreement (Lease Number 260) pursuant to which Gump & Ayers acquired additional adjoining office space in the subject premises (R. 31 and 32).

5. Pursuant to the terms of Lease Number 260, Gump & Ayers leased the additional space for eight years and eight months beginning August 26, 1985 (R. 84 and 102).

6. Defendant Gump & Ayers continued to pay rentals pursuant to the aforementioned Agreements through the month of April, 1988 and ceased to make lease payments thereafter and vacated the premises in May, 1988 (R. 32).

7. At the time Gump & Ayers ceased to make its monthly rental payments, the monthly rental obligation was the sum of $7,733.37 (R. 292).

8. On December 7, 1988, Union Park and Gump & Ayers entered into a Settlement Agreement and Mutual Release of Claims to resolve the unliquidated continuing liability of Gump & Ayers to Union Park under the two (2) outstanding leases for commercial space. The Settlement Agreement and Mutual Release operated as a release of Gump & Ayers' liability to Union Park on the outstanding leases in exchange for payment of consideration consisting of an initial payment of $10,000.00, a second payment of $10,000.00 due December 15, 1988 and execution of a Promissory Note providing for payment of the principal sum of $55,000.00. A copy of the Settlement Agreement and Mutual Release of Claims is attached hereto as Addendum Exhibit "A". A copy of the Promissory Note is attached hereto as Addendum Exhibit "B". These documents were before the Court in numerous pleadings (R. 3, 15, 104 and 108).

9. Gump & Ayers made payments under the Note through July 16, 1990 (R. 291). Gump & Ayers has refused to make further payment under the Note (R. 3 and 15).

10. There is a principal balance due and owing on the Note in the sum of $35,352.46 as of July 16, 1990 (R. 291).

11. At the time the Settlement Agreement was prepared in November, there was past-due and owing pursuant to the Lease Agreements the sum of $54,133.59 for rentals for the months of May through November, 1988 (R. 292, 195 and 217). On the date of execution, December's rent also had accrued in the sum of $7,733.37 for total rent due in the sum of $61,866.96.

12. Thus, the sum of $13,133.04 was to be paid to resolve Gump & Ayers' potential liability for future unaccrued rentals (settlement amount of $75,000.00 minus accrued rentals of $61,866.96 equals $13,133.04).

13. As of the date of the execution of the Settlement Agreement, Gump & Ayers had potential liability to Union Park for unaccrued rentals in the sum of $487,202.31 calculated as follows:

a. December 1988 through February 1994 (date of termination of earliest lease, Number 290 (R. 216) equals sixty-three (63) months).

b. Monthly lease obligations of $7,733.37 (R. 292).

c. $7,733.37 x 63 = $487,202.31.

d. This figure does not take into account potential increases for shared tenant expenses due under the lease and escalation clauses (R. 67).

14. While negotiating with Gump & Ayers to settle its potential liability, Union Park was also negotiating with third parties in order to mitigate damages to Union Park as a result of the breach (R. 35 and 59).

15. On November 23, 1988, Union Park entered into a Lease with Matrix Funding Corporation covering a portion of the space formerly occupied by Gump & Ayers. Matrix did not take possession, nor begin paying rents until January, 1989 (R. 35, 60 and 136).

16. However, in the process, Matrix Funding Corporation vacated other space in the Subject Premises, which space remained vacant for one year (R. 35 and 60).

17. In order to secure rental of the portion of the space formerly occupied by Gump & Ayers by Matrix Funding, Union Park re-negotiated its lease with Matrix Funding and received a lower rent per square foot (R. 35 and 60).

18. In connection with the partial reletting of the Gump & Ayers space to Matrix Funding, Union Park incurred costs in the sum of $18,559.00 in leasehold improvements (R. 36 and 60).

19. By a Lease Agreement dated April 30, 1988, Union Park was able to lease the balance of the former Gump & Ayers space to Miles, Inc. (R. 36 and 61).

20. Presuming that the two substitute tenants identified herein remain in possession of the subject premises and pay all rentals on time, Gump & Ayers' minimum potential liability for future rents, as of the date it entered into the Settlement Agreement, was in the sum of $71,531.82 (rental shortfalls $52,972.82 plus tenant improvements $18,559.00 equals $71,531.82).[1]

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[1] RENT EXPECTATIONS (R. 61 and 62)

1988

Gump & Ayers Nos. 260 and 290	$7,159.92 + $573.45 =	$ 7,733.37 per month
Matrix Nos. 250 and 260	$6,666.45 + 2,366.27 =	$ 9,032.72 per month
		$16,766.09

LOSS MITIGATION

1989	5 months	6 months	1 month
Matrix No. 250	$12,967.04	$13,291.25	$14,653.96
Miles, Inc. No. 290	1,362.71 $14,329.75	1,362.71 $14,653.96	1,593.92 $16,247.88
Difference	$ 2,436.34	$ 2,112.13	$ 518.21

LOSS EXPECTATION THROUGH MAY 31, 1994

($2,436.34 x 5 months)	=	$12,316.70
(2,112.13 x 6 months)	=	12,672.78
(518.21 x 54 months)	=	27,983.34
Rental Differential Subtotal:		$52,972.82
IMPROVEMENTS =		$18,559.00
TOTAL:		$71,531.82

21. Gump & Ayers opened settlement negotiations prior to October 4, 1988 (R. 314).

22. No portion of the Subject Premises was leased to a substitute tenant prior to November 23, 1988, on which date a portion of the Subject Premises was relet to Matrix Funding. Even that portion of the Subject Premises remained vacant until January 1, 1989 (R. 135).

FACTS RELEVANT TO GUMP & AYERS' MOTION FOR LEAVE TO FILE AMENDED ANSWER AND COUNTERCLAIM

23. Simultaneously with filing its Answer, Gump & Ayers propounded discovery requests to Union Park (R. 14 and 18).

24. Union Park responded to the outstanding discovery on January 10, 1991 (R. 19), and waited over one month, until February 22, 1991, prior to filing its Motion for Summary Judgment (R. 19 and 28).

25. Gump & Ayers responded to the Motion for Summary Judgment on March 21, 1991 (R. 213) and on March 22, 1991 filed a Motion for Leave to file an Amended Answer as well as a Counterclaim, both of which sought relief based upon allegations of fraud (R. 235).

26. Gump & Ayers' Motion for Leave to Amend was completely unsupported. It is composed of two sentences, neither of which argues any legal basis demonstrating that Gump & Ayers was entitled to the relief requested (R. 235).

27. Argument on Union Park's Motion for Summary Judgment and on Gump & Ayers' Motion for Leave to Amend was heard by the Court on January 10, 1992 (Appendix Exhibit "C" at Page 1).

28. The Court stated, at the opening of argument, that it was not necessary to hold specific and separate arguments on the two Motions, as the subject matter of the two was intertwined (Addendum Exhibit "C" at Pages 2 and 3).

29. Mr. McDonald, counsel for Gump & Ayers, agreed that the various Motions pending before the Court were all related and that argument relevant to the Motion for Summary Judgment "is going to really resolve everything" (Addendum Exhibit "C" Page 4).

30. The Court gave full consideration to Gump & Ayers' arguments of fraud (R. 437), and only after hearing all of Gump & Ayers' arguments relevant to the issue of fraud, and determining that any misrepresentation, if made, was not shown to be material (R. 437), granted Union Park's Motion for Summary Judgment and denied Gump & Ayers' Motion for Leave to Amend to raise fraud both as an affirmative defense and as a counterclaim as said Motion was then moot (R. 442).

31. In response to Mr. McDonald's comment to the Court that he felt denial of his Motion for Leave to Amend had kept the issue of fraud from coming before the Court (R. 443), the Court specifically responded that the Motion was before the Court, it was

a pending Motion, that the Defendant had argued the issue of fraud and that the Court had duly considered Defendant's fraud claims (R. 443).

32. On August 25, 1992, the Court entered an Order granting Union Park's Motion for Summary Judgment on the issue of liability, reserving for further proceedings issues of damages. By that same Order, Gump & Ayers' Motion for Leave to Amend was denied (R. 470, 471).

FACTS RELEVANT TO UNION PARK'S SECOND MOTION FOR SUMMARY JUDGMENT ON DAMAGES AND GUMP AND AYERS' CROSS-MOTION FOR SUMMARY JUDGMENT PERTAINING TO PROPRIETY OF INTEREST RATE

33. Union Park filed its second Motion for Summary Judgment on the issue of damages on August 28, 1992 (R. 474).

34. The Motion for Summary Judgment was supported by a Memorandum of Points and Authorities (R. 477) and an Affidavit of Amount Due and Owing (R. 502).

35. Union Park's second Motion for Summary Judgment was granted by Order dated December 16, 1992. Union Park obtained Judgment for the principal balance owing on the Note, as well as attorney's fees, costs of Court and interest at the rate of 10% per annum (R. 606-608). Gump & Ayers now appeals only the propriety of the Court's use of a 10% "per annum" interest rate. (See, Appellant's Brief).

36. The portion of the Promissory Note which describes the interest rate reads as follows: "This Note shall bear interest at the rate of ten percent (10%) from and after May 1, 1988" (R. 507).

37. Gump & Ayers' Cross-Motion for Summary Judgment filed on October 1, 1992 pertains solely to the same issue of determining the time period pursuant to which the 10% interest rate is to be calculated (R. 568).

38. The Court Order dated December 16, 1992 also denied Gump & Ayers' Cross-Motion for Summary Judgment (R. 606, 607 and 608).

SUMMARY OF ARGUMENTS

INTRODUCTION

The present action arose out of Gump & Ayers' breach of its Lease Agreements with Union Park. It has never been disputed that Gump & Ayers leased premises from Union Park pursuant to two Lease Agreements dated June 1, 1983 and June 28, 1985 (R. 54). It is undisputed that the leases were to run through early 1994 (R. 55). Gump & Ayers admits that it breached the Lease Agreements by abandoning the premises in May, 1988 at a time when it had approximately five (5) years remaining liability under the Leases (R. 190). Gump & Ayers admits that it remained liable for ongoing Lease payments, despite the fact that it had vacated the premises (R. 190).

After substantial negotiations, the parties executed a Settlement Agreement in December, 1988, which Agreement was to resolve the accrued liabilities of Gump & Ayers for the eight (8) months which had elapsed since its abandonment of the premises, as well as an additional sum in settlement of liability for future lease payments that might accrue with respect to the abandoned premises (R. 192). The Settlement Agreement included a Promissory Note in the sum of $55,000.00, which Note is the subject matter of Union Park's present action.

Union Park brought the present action to enforce that Promissory Note. Gump & Ayers' sole defense to liability is based on alleged misrepresentations regarding re-leasing of the premises, which induced them to enter into the Settlement Agreement and Promissory Note. Gump & Ayers alleges it would not have agreed to pay any sums in excess of rentals already accrued, had it not been for the allegedly fraudulent representations. Thus, the issue before the District Court, which is the same issue to be reviewed by this Court, was whether Gump & Ayers produced sufficient evidence of material fraudulent representations to preclude the enforcement of the Settlement Agreement and Promissory Note. The District Court properly concluded that the evidence produced by Gump & Ayers was insufficient as a matter of law. Union Park's

Motion for Summary Judgment was granted on the issue of liability and the Defendant's Motion for leave to Amend was denied.

Union Park's second Motion for Summary Judgment was filed on the issue of damages. Union Park prevailed on all points, including the principal balance due and owing on the Note, right to attorney's fees and costs, as well as interest. Gump & Ayers filed a Cross-Motion for Summary Judgment on the issue of the appropriate interest rate to be employed. The Note provides that interest be calculated at the rate of 10% but does not state the time period over which interest is to be calculated. The Court properly employed a per annum interest rate in reliance on Utah statutes.

ARGUMENT

POINT I

SUMMARY JUDGMENT IS PROPER WHEN THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT

The standard for entry of Summary Judgment as set forth under Rule 56, Utah Rules of Civil Procedure, reads as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Emphasis added).

Utah case law makes it clear that Rule 56 requires two (2) separate inquiries. There must be a genuine issue of fact to be

resolved by the trier of fact. Further, the disputed fact must be material to the outcome of the action. "The foregoing rule does not preclude summary judgment simply whenever some fact remains in dispute, but only when a material fact is genuinely controverted". (Emphasis added). Heglar Ranch, Inc. vs. Stillman, 619 P.2d 1390, 1391 (Utah 1980).

It is undisputed that Gump & Ayers breached its Lease obligations to Union Park. It is also undisputed that past-due rentals in the amount of $61,855.96 were due at the time that Gump & Ayers agreed to settle its past and future obligations for $75,000.00, payable $20,000.00 initially with the balance over time pursuant to the subject Note. It is undisputed that Gump & Ayers signed the Settlement Agreement and Note and made payments for a while. Consequently, Gump & Ayers' only defense to being obligated under the Note is its allegation of fraudulent inducement. Gump & Ayers has only cited one representation that it alleges was false which supports its claim.

Gump & Ayers alleges, through the Affidavit of Jerry Floor, that during late November and early December, 1988 (the Settlement Agreement was executed December 7, 1988), an officer of Union Park represented to him that the leased premises remained vacant at that time (R. 192). Union Park submitted significant evidence contradicting the Defendant's allegation that this allegedly false

representation was made. (See, Affidavit of Thomas Lloyd, R. 289-314).

Union Park disputed this allegation and produced to the Court a copy of the Lease Agreement with the first substitute tenant (Matrix Funding), which tenant took over a portion of the space vacated by Gump & Ayers. That Lease Agreement establishes that this entity did not take possession of the premises and begin paying rent until January, 1989 (R. 135). Therefore, the premises were vacant at the time Gump & Ayers alleges the representations were made. Union Park also produced for the Court copies of the time records of the attorney who represented Gump & Ayers in the negotiations. Those time records establish that negotiations actually occurred prior to execution of the Matrix Lease (R. 335). It is Union Park's position that any representations which were made regarding the status of the premises during the negotiation phase were made at a time when the premises were not only vacant, but not subject to a new lease. Consequently, even the existence of a disputed fact is questionable.

It is apparent that the District Court disbelieved Gump & Ayers and felt that no misrepresentation had been made. "I am not convinced that there were misrepresentations, but there is some evidence to the contrary" (R. 437). However, the District Court indulged Gump & Ayers on this point stating: "And so on that

point, Plaintiff would not be entitled to Summary Judgment alone" (R. 437). Therefore, the District Court properly resolved the disputed fact of the misrepresentation in favor of Gump & Ayers.

However, the District Court went on to grant Summary Judgment on the issue of liability, stating that even if such a representation had been made, it was not material to the Settlement Agreement and Promissory Note. The Court stated:

> ...[I]t seems to me that that, under all of the facts, including the contractual obligations which the defendants submit they did owe at that time, both having already accrued and what they were exposed to, and in light of the damages amounts that the plaintiffs did suffer as a result of the termination of the lease, and cost associated with re-letting, and all of that, when you look at all of the numbers that are involved, I just don't see this as material. ...For that reason then, I am not inclined to accord that view and would rather on the issue of liability grant summary judgment in favor of the plaintiff.

(R. 438). Thus, the issue is whether, giving Gump & Ayers the benefit of the presumption that the allegedly false statements were made, whether they had any material bearing on the execution of the Settlement Agreement and Promissory Note. It is clear that they did not.

A. The District Court properly applied the "clear and convincing evidence" standard.

Gump & Ayers raised the affirmative defense of fraud in the inducement to the enforcement of the Promissory Note. Fraud is a

wrong of such a nature that its existence must be shown by clear and convincing evidence. Taylor vs. Gasor, Inc., 607 P.2d 293 (Utah 1980). When opposing a motion for summary judgment on an integrated contract, and with all disputes resolved in its favor, the party alleging fraud must demonstrate the elements of fraud in a clear and convincing manner. Laird vs. Laird, 597 P.2d 463, 466 (Wyo. 1979), and Applied Genetics vs. First Affiliated Securities, 912 F.2d 1238, 1243 (10th Cir. 1990). Further, the Promissory Note which Union Park attempts to enforce is part of a Settlement Agreement. Settlement agreements will only be set aside for the strongest of reasons, which also must be shown by clear and convincing evidence. Lomas & Nettleton Co. vs. Tiger Enterprises, 585 P.2d 949 (Idaho 1978). After reviewing the evidence and giving full consideration to Gump & Ayers' evidence of fraud (R. 437) and resolving the factual disputes in favor of Gump & Ayers, as the non-moving party, the District Court properly applied these standards and granted Summary Judgment in favor of Union Park on the issue of liability. Even after resolving all disputes in Gump & Ayers' favor the Court felt that: "...Defendant has not shown by clear and convincing evidence that the misrepresentations were material..." (R. 437). This Court should also apply the "clear and convincing standard" in reviewing the Order granting Union Park's Motion for Summary Judgment.

The leading case on this point is Anderson vs. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986). In the Anderson case, the United States Supreme Court was reviewing a grant of summary judgment in favor of the Defendant. The case dealt with a libel case in which the plaintiff carried the burden of proving that the allegedly libelous material was published with malice. The United States Supreme Court in Anderson determined that a court, when reviewing a motion for summary judgment, should consider the substantive evidentiary burden that the non-moving party has to carry in the event of a trial on the merits. Id. at 252. The Supreme Court noted that they should apply the clear and convincing standard which applies to libel cases. Id. at 244. The Supreme Court in Anderson acknowledged that there was a time when the test at the summary judgment stage was the "scintilla of evidence" standard.

> Formerly, it was held that if there was what is called a **scintilla** of evidence in support of a case, the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the **onus** of proof is imposed. (Boldface in the original, additional emphasis added).

Id. at 251. The Supreme Court expressly rejected the "scintilla" rule and adopted the position that, even at the summary judgment stage, the substantive evidentiary burden should be considered.

> Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not. (Emphasis added).

Id. at 254.

Further, the Supreme Court in Anderson, acknowledged that a judge is still not to weigh evidence, but to give the non-moving party the benefit of every dispute and presumption.

> [I]t is clear enough from our recent cases that at the summary judgment case the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.

Id. at 249. However, if having given the non-moving party the benefit of every presumption and inference, no reasonable finder of fact could find in favor of the non-moving party, summary judgment is proper.

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial - whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact, because

> they may reasonably be resolved in favor of either party. (Emphasis added).

Id. at 250.

Finally, while the Anderson case was a libel case, the United States Supreme Court specifically provided that the substantive burden of evidence is relevant to any civil case. It specifically stated:

> This view is equally applicable to a civil case to which the "clear and convincing" standard applies. ...Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the substantive evidentiary burden. (Emphasis added).

Id. at 254.

The "substantive burden" test as set forth in Anderson has been adopted by many jurisdictions and in many factual scenarios. This test was adopted by the Nevada Supreme Court in the case of Bulbman, Inc. vs. Nevada Bell, 825 P.2d 588 (Nev. 1992), in which a fraud claim was dismissed at the summary judgment stage. The Nevada Supreme Court noted that the pleadings and proof should be construed in a light most favorable to the moving party. Id. at 591. After acknowledging that the Summary Judgment standard has not changed in that regard, the Court went on, in reliance on the Anderson case, to rule that summary judgment is still proper if viewing the fact in a light favoring the non-moving party the

evidence is such that no reasonable finder of fact could return a verdict for the non-moving party. Id.

The same result was reached by the Washington Appellate Court in Adams vs. Allen, 783 P.2d 635 (Wash. App. 1989). The Adams case was again a summary judgment case involving a claim of fraud. In Adams the court noted that the party pleading fraud must produce evidence on all of the elements of fraud to fulfill its burden of proof. The Court then dismissed the claim of fraud in reliance on the Anderson substantive burden test. Id. at 640.

The Arizona Supreme Court has also adopted the "substantive burden test" in a series of cases which has applied the test to all civil cases. This series of cases begins with Dombey vs. Phoenix Newspapers, Inc., 724 P.2d 562 (Ariz. 1986). In Dombey, the Arizona Supreme Court applied the "substantive burden" test in the context of a libel case.

> In sum we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the New York Times "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant.

Id. at 572. The Arizona Supreme Court subsequently applied the rule to ordinary tort cases. In the case of Orme School vs. Reeves, 802 P.2d 1000 (Ariz. 1990), the court was faced with a motion for summary judgment pertaining to an indemnity claim. In Orme, a student contracted salmonella from meals served to him at school. The disease was contracted during a time period during which the student consumed 122 different meals at the school. However, only one was prepared by the school. The other 121 meals were prepared by an outside food service. The school filed a motion for summary judgment and prevailed. The court in Orme noted that in this tort case the standard of evidence was merely one of "preponderance". Moreover, and in reliance of the Anderson case, the court determined that the chance that the school prepared the "culpable" meal, which was a less than 1 in 100 chance, would not provide a fact finder with a reasonable basis upon which to find the school liable.

> On such evidence, no reasonable juror could conclude by even a preponderance of the evidence that Orme, rather than CWS, was actively responsible for the injury through meals.

Id. at 1010.

This series of cases was most recently reaffirmed in Thompson vs. Better-Bilt Aluminum Prod., 832 P.2d 203 (Ariz. 1982), wherein the Arizona Supreme Court again reiterated that the non-moving

party is to receive all reasonable inferences, but thereafter the court can still grant summary judgment if appropriate.

> ...[T]he motion should be granted if no reasonable jury could find the requisite evil mind by clear and convincing evidence.

Id. at 211.

The "substantive burden" test has also been adopted by the Wyoming Supreme Court in Albrecht vs. Zwaanshoek Holding, 762 P.2d 1174 (Wyo. 1988) in a summary judgment case involving a claim of fraud. The court noted that it is not the judge's function to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial and in that process the Anderson test is to be employed.

> The correct approach is articulated in Anderson vs. Liberty Lobby [citation omitted]. The standard to be applied for that purpose is whether a reasonable jury could find the evidence sufficient to meet the clear and convincing standard...

Id. at 1182.

Consequently, in light of the authority of Anderson, and the subsequent cases which have adopted the "substantive burden" test in similar circumstances, the proper standard to review Gump & Ayers' defense of fraud is whether there was sufficient evidence, after all inferences and disputes resolved in its favor, to find that it had met its burden of showing by clear and convincing evidence that a fraud had occurred. This requires an inquiry into

all elements of fraud, including materiality and reasonable reliance. As will be shown in Subpart B below, the District Court, after resolving all factual disputes in favor of Gump & Ayers, properly concluded that Gump & Ayers had not shown by clear and convincing evidence that the alleged misrepresentation was material. Therefore, the District Court correctly granted Summary Judgment in favor of Union Park. Further, the ruling can also be supported on the basis that there was no showing by Gump & Ayers of reasonable reliance, or Union Park's intention to induce reliance, or Gump & Ayers' consequent damage. This Court should approve this standard, and rule that it was properly applied in affirming the Order granting Summary Judgment in Union Park's favor.

B. The District Court properly determined that Gump & Ayers' allegations did not raise an issue of material fact.

In order to review the ruling that Gump & Ayers did not show by clear and convincing evidence the "materiality" of the allegedly fraudulent statements, it is necessary to review the factual context and what the District Court referred to as "all of the numbers that are involved". When one examines Gump & Ayers' potential liability under the Lease Agreements, both its minimum and its maximum potential liability, it cannot be reasonably found that the alleged misrepresentation had a material effect on inducing execution of the Settlement Agreement.

Gump & Ayers abandoned the leased premises in May, 1988 (R. 190). It signed the Settlement Agreement and Promissory Note on December 7, 1988 (R. 192). Gump & Ayers admits that the Settlement Agreement and Promissory Note were intended to resolve not only its accrued liability as of that date, but also its potential future liability (R. 194, 195). As of the date of the Settlement Agreement, the accrued liability of Gump & Ayers for the eight (8) months which had elapsed since it abandoned the premises, was the sum of $61,866.96 (R. 292). This is predicated on a calculation of Gump & Ayers' monthly lease obligation of $7,733.37 over the eight (8) months which had elapsed. This left the sum of $13,133.04 as a payment in settlement of potential future liability[2]. Thus, the sum of $13,133.04 was to be paid to settle Gump & Ayers' potential future liability. In defense, Gump & Ayers stated that it would not have agreed to pay any sum in excess of accrued rentals had it known that a portion of the premises it had abandoned was subject to a lease agreement with a substitute tenant (R. 192). In

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[2]Gump & Ayers contends that the monthly lease obligation was $7,516.26, which would have resulted in a payment of $60,130.08 for accrued obligations, while leaving $14,869.92 to be paid in settlement of potential future obligations (R. 195). Union Park believes its calculation to be more accurate. Union Park submitted to the District Court, through the Supplemental Affidavit of Thomas Lloyd, documentation of the actual amounts paid by Gump & Ayers pursuant to its Lease Agreement, which documentation supports Union Park's calculation. Gump & Ayers never, thereafter attempted to contradict Union Park's use of the $7,733.37 per month figure.

response to this allegation Union Park provided the Court with evidence of the total amount for which Gump & Ayers would be liable to Union Park, pursuant to the Leases, were the Settlement Agreement never entered into. These numbers, which were not substantively disputed by Gump & Ayers, conclusively establish, as a matter of law, the immateriality of the alleged misrepresentations.

As pointed-out above, Gump & Ayers agreed to pay the sum of $13,133.04, in excess of its accrued liabilities, in settlement of its potential future liabilities under the Lease. As of the date of the execution of the Settlement Agreement and Promissory Note, Gump & Ayers' potential future liability was in the sum of $487,775.76. (See, Statement of Facts at Paragraph 15). This figure represents the Lease obligations, as of the date of the Settlement Agreement, multiplied by the number of months remaining on the Lease. This amount does not include increases in tenant shared expenses and escalator clauses, which were unliquidated at the time of the settlement agreement. This potential future liability obviously dwarfs the amount paid by Gump & Ayers to settle its future liability. However, even more telling is Gump & Ayers' minimum potential liability under the Lease Agreement.

As set forth in the Statement of Facts, Union Park had managed to partially mitigate its damages by entering into a substitute

lease agreement, pursuant to which a portion of the space formerly leased to Gump & Ayers would be occupied by a substitute tenant. This is the lease which Gump & Ayers claims was not revealed to it, and upon which it bases its affirmative defense of fraud. Approximately six (6) months after execution of the Settlement Agreement and Promissory Note, Union Park was able to further mitigate its damages by reletting the remainder of the premises. This fact, having not occurred at the time the Settlement Agreement was executed, could not have possibly been within the contemplation of the parties. However, for purposes of argument, Union Park presented to the Court a calculation of damages which it suffered and will suffer, even with the entirety of the leased premises relet to new tenants. The calculation presented to the District Court also presumed that the substitute tenants would remain and pay all lease payments in a timely manner. Of course, this is giving Gump & Ayers the benefit of every possible inference. In the absence of the Settlement Agreement, if any of these tenants were to abandon the premises prior to termination of Gump & Ayers original Lease Agreements, or fail to meet their Lease obligations, Gump & Ayers would have remained liable through early 1995. Giving Gump & Ayers the benefit of all these inferences and presumptions, Gump & Ayers would still be liable to Union Park for future rentals

in the sum of $71,531.82 if the Settlement Agreement and Promissory Note were set aside. (See, Statement of Facts at Paragraph 22).

In summary, Gump & Ayers agreed to pay the sum of $13,133.04 to settle future unliquidated lease liabilities, which would range between a minimum of $71,531.82 and a maximum of $487,775.76. In light of these numbers, Gump & Ayers' allegation that Union Park failed to inform it, at the time of the negotiations, that it had entered into a lease agreement which would, in the future, place a tenant in a portion of the premises, is completely immaterial. In fact, Gump & Ayers' liability would only increase if the Settlement Agreement were set aside.

A settlement agreement is a contract like any other which must be supported by consideration. It is clear that consideration can consist of the resolution of a dispute when there are unliquidated damages, even though the amount in dispute has not been precisely determined or one party may be mistaken as to the amount of the potential obligation settled thereby. International Motor Rebldg. Co. vs. United Motor Exch., 393 P.2d 992 (Kan. 1964). Further, settlement agreements are greatly favored by the law and should not easily be set aside. Lomas & Nettleton Co. vs. Tiger Enterprises, 585 P.2d 949 (Idaho 1978). Therefore, to set aside the Settlement Agreement and Note, there would need to be finding that the alleged misrepresentation, if true, had a material effect which effected

the very essence of the agreement. Gump & Ayers has not shown any evidence of materiality. The District Court correctly concluded, as should this Court, that even assuming the existence of a misrepresentation concerning the status of the premises, that statement has not been shown to have a material effect on the settlement of an unliquidated liability and therefore Summary Judgment is proper in favor of Union Park.

C. The ruling of the District Court should be upheld if it can be upheld on any proper theory.

It is well established law that this Court should uphold the decision of the District Court if it can do so on any proper ground. Matter of Estate of Shepley, 645 P.2d 605 (Utah 1982). The Utah Supreme Court has gone so far as to say that this rule should be enforced even in cases where the lower court assigned a specific but incorrect reason for its ruling.

> In any event, we are inclined to affirm a trial court's decision whenever we can do so on proper grounds, even though the trial court may have assigned an incorrect reason for its ruling.

Jesperson vs. Jesperson, 610 P.2d 326, 328 (Utah 1980).

In the present case, the trial court could have granted Union Park's Motion for Summary Judgment, not only for Gump & Ayers' failure to produce clear and convincing evidence of a material misrepresentation, but also as a result of its total failure to

produce clear and convincing evidence on the other essential elements of fraud.

There are nine (9) elements to be shown in support of an allegation of fraud. The elements of a fraudulent representation are:

> (1) That a representation was made; (2) concerning a presently existing material fact; (2) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he has insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

Pace vs. Parrish, 247 P.2d 273, 274 (Utah 1952) as quoted in Wright vs. West Side Nursery, 787 P.2d 508 (Utah App. 1990).

Further, it is clearly the law that a party alleging fraud, even at the summary judgment stage, must produce evidence on each of the nine elements. Pace vs. Sagebrush Sales Co., 560 P.2d 789 (Ariz. 1977). It is also clear that failure to support the elements of fraud with specific evidence is grounds for dismissing a claim of fraud on summary judgment. See, Norton vs. Blackham, 669 P.2d 857 (Utah 1983).

Even assuming that misrepresentations were made as alleged, Gump & Ayers has not provided any evidence to support the other elements of fraud. Examination of the Affidavit of Jerry Floor

filed in opposition to Union Park's Motion for Summary Judgment shows that Gump & Ayers has made no allegation that Gump & Ayers reasonably relied on the alleged representations, or that Union Park intended Gump & Ayers to rely thereon, or that Gump & Ayers has been damaged by its reasonable reliance. The Affidavits filed by Gump & Ayers which comprise the whole record of this matter, make no attempt to carry Gump & Ayers' substantive burden on these issues.

Failure to allege a proper factual basis for reasonable reliance resulted in dismissal of the plaintiff's case in a summary judgment context in Sprunk vs. First Bank Western M. Missoula, 741 P.2d 766 (Montana 1987). In Sprunk the plaintiff alleged through an affidavit that the defendant had made certain misrepresentations which induced execution of settlement arrangements on a prior debt. However, the plaintiff failed to set forth the specific false representations made. Id. at 769. The court also noted that the plaintiff failed to allege a factual basis which would support the element of reasonable reliance. Based upon the foregoing, the motion for summary judgment was granted and the plaintiff's complaint dismissed. In support of its ruling, the court repeated the well established rule of law that fraud can never be presumed and the party carrying the burden of proof must produce evidence on each of the nine elements of fraud. Id. at 769.

It is undisputed that the entities involved in this action are both sophisticated corporations. In support of its Motion for Summary Judgment, Union Park also submitted to the District Court the time sheets of the attorney representing Gump & Ayers, proving that Gump & Ayers was fully represented by counsel during the negotiation phase of the Settlement Agreement (R. 338-345). In addition, in the Settlement Agreement, Gump & Ayers acknowledged the advice of counsel (R. 106). It is also clear that the parties to the Settlement Agreement were in an adverse position, each wanting to resolve the dispute between the parties on the most favorable basis possible.

The only evidence placed before the District Court by Gump & Ayers, and relevant to the issue of reasonable reliance, is the bare conclusion set forth in the Affidavit of Jerry Floor, which reads: "In negotiating the Settlement Agreement and Promissory Note, Gump & Ayers relied on the statement by Thomas Lloyd..." R. 192).

It is well established law in Utah that a party resisting a Motion for Summary Judgment cannot rely on statements in an affidavit, which statements constitute unsupported conclusions of law. Specific facts in support of those conclusions must be set forth. Winter vs. Northwest Pipeline Corp., 820 P.2d 916 (Utah 1991). Conclusory allegations of fraud were determined to be

insufficient by the Utah Supreme Court in Norton vs. Blackham, 669 P.2d 857 (Utah 1983). In the Norton case, the plaintiff was attempting to set aside a voluntary release in order to pursue a tort action. The Norton case was dismissed on summary judgment, which dismissal was upheld by the Utah Supreme Court because the plaintiff's affidavit filed in opposition to the motion for summary judgment was conclusory, not alleging the specific underlying facts. Id. at 859. Gump & Ayers' statement of reliance is likewise purely conclusory. Nothing was submitted for consideration which stated in what ways or manner Gump & Ayers reasonably relied.

Further, Gump & Ayers has made absolutely no allegation that its reliance was reasonable. The undisputed facts establish that Gump & Ayers' counsel participated in the negotiation and drafting of the Settlement Agreement and Gump & Ayers could have protected itself against the present eventuality through that Agreement by setting forth the factors upon which it was relying. Gump & Ayers has made no allegation that any set of circumstances precluded it from taking any of these steps.

In fact, the Settlement Agreement which was executed by Gump & Ayers and in which its counsel was involved in drafting, clearly and unambiguously states as follows:

> 7. Union Park and Gump & Ayers acknowledge that this compromise and release has been

> entered into freely and with the advice of counsel and that no representations of fact or opinion have been made by any party or by anyone acting in their behalf to induce this compromise with respect to the nature of their claims and damages. (Emphasis added). (Addendum Exhibit "A").

By entering into a Settlement and Release Agreement with this language, Gump & Ayers specifically represented to Union Park that nothing that was said by Union Park had any effect upon their willingness to enter into the Settlement Agreement and execute the Promissory Note. Gump & Ayers specifically disclaimed its right to argue reliance and therefore should be estopped from raising the issue of reasonable reliance in attempting to avoid its obligations under the Settlement and Release Agreement. It is obvious that the District Court could have found that Gump & Ayers did not raise sufficient evidence of reasonable reliance in light of its contractual representation that it did not rely on any statements made on behalf of Union Park. Therefore, Summary Judgment in favor of Union Park could be upheld on this basis alone.

Finally, Gump & Ayers did not allege that it relied to its detriment and suffered damages as a result thereof. The undisputed facts establish that if the Settlement Agreement had not been entered into, Gump & Ayers' liability would have been larger, not smaller than agreed to. All of the evidence regarding Union Park's efforts to mitigate damages was before the District Court in Union

Park's original Memorandum and Affidavit Supporting Summary Judgment. None of that evidence was rebutted or challenged with contrary evidence by Gump & Ayers. Union Park's undisputed evidence established that, at a bare minimum, Gump & Ayers would owe Union Park in excess of $70,000.00 in future rents, were not for the Settlement Agreement. Thus, Gump & Ayers has completely failed to produce any evidence showing that it has been damaged. The rule was well stated by the United States Supreme Court in Celotex Corp. vs. Catrett, 106 S.Ct. 2548, 477 U.S. 321, 91 L.Ed. 2d 265 (1986) that a party must produce evidence on every essential element of its case.

> ...Rule 56 (c) mandates the entry of summary judgment... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Id. at 2552.

Thus, Gump & Ayers' total failure to produce any evidence regarding reasonable reliance, knowledge by Union Park that there would be reliance, or damages resulting from the reliance, is itself an appropriate basis on which to uphold the ruling of the District Court, as Gump & Ayers also failed to meet its substantive

burden on these issues. Therefore, there has not been an adequate showing of fraud.

POINT II

GUMP & AYERS' MOTION FOR LEAVE TO AMEND ITS ANSWER TO ALLEGE BOTH AN AFFIRMATIVE DEFENSE AND A COUNTER CLAIM BASED UPON FRAUD WAS PROPERLY DENIED

Gump & Ayers' Motion for Leave to Amend its Answer and to Assert a Counterclaim was properly denied. There are at least three (3) bases for upholding the District Court's ruling. First, Gump & Ayers' Motion was unsupported and would have worked a substantial prejudice on Union Park. Second, Gump & Ayers' recently claimed argument that it was in a Rule 11, Utah Rules of Civil Procedure, paradox, is unsupportable. Third, contrary to the statements in Appellant's brief, the District Court gave full consideration to Gump & Ayers' allegations of fraud which were the substance of its Motion to Amend.

A. Gump & Ayers' Motion for Leave to Amend was unsupported and therefore properly denied by the District Court.

On March 22, 1991, Gump & Ayers filed its Motion for Leave to File an Amended Answer and Counterclaim (R. 235). The Motion for Leave to Amend was unsupported by either affidavits or a memorandum. The Motion itself cites no legal authority or basis for the relief requested. The Motion reads, in its entirety, as follows:

> Defendant moves the Court for its order granting leave to amend its Answer in this action and to file a Counterclaim. Copies of the proposed Amended Answer and Counterclaim are attached hereto.

Rule 4-501, Utah Code of Judicial Administration, governing motion practice in district courts requires a memorandum in support of all motions.

> All motions, except uncontested or ex parte matters, shall be accompanied by a memorandum of points and authorities, appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion.

On May 7, 1991, Union Park filed a Memorandum in opposition to the Motion for Leave to Amend, which Memorandum complies with the requirements of Rule 4-501. It included a statement of facts supported by documentary evidence and references to the record in support of each fact alleged. It then set forth the standard of review for motions for leave to amend and legal argument that Gump & Ayers' Motion for Leave to Amend should be denied.

Pursuant to Rule 15, Utah Rules of Civil Procedure, a party may amend its answer "only by leave of court or by written consent of the adverse party... when justice so requires". Further, the standard to be considered when determining whether justice requires leave for amendment is undue prejudice. Bekins Bar V Ranch vs. Huth, 664 P.2d 455 (Utah 1983). These authorities were brought to

the attention of the Court through Union Park's responsive memorandum. Union Park further brought to the attention of the Court the prejudice it would suffer as a result of the requested amendment.

Union Park commenced this action by filing a Complaint on November 16, 1990 (R. 2). The Defendant was served on November 23, 1990 (R. 13). The Defendant filed an Answer and simultaneously filed its First Set of Interrogatories and Requests for Production of Documents on December 13, 1990 (R. 14 and 18). Union Park responded to the discovery on January 14, 1991 (R. 19), and then waited five (5) weeks before filing its Motion for Summary Judgment (R. 50). Even after Union Park's Motion for Summary Judgment had been filed with the Court, the Defendant delayed an additional thirty (30) days prior to filing its Motion for Leave to Amend (R. 50, 52 and 235). Union Park had prepared the Motion for Summary Judgment and the supporting documentation relevant thereto in reliance on the issues as framed by the pleadings on file at that time (R. 269). Union Park showed the Court the prejudice it would suffer if the belated Motion for Leave to Amend were granted.

Even after Union Park responded to the unsupported Motion for Leave to Amend, Gump & Ayers did not avail itself of its opportunity provided by Rule 4-501 (1) (c) to file a Reply Memorandum in support of its Motion. The unsupported Motion was

noticed-up for decision and decided by the Court on January 10, 1992. The District Court exercised its broad discretion, which it has under Utah law, to deny the unsupported Motion. Westley vs. Farmers Ins. Exchange, 663 P.2d 93, 94 (Utah 1983). In light of the fact that the motion was unsupported by affidavits, facts, a memorandum, any authority or legal argument contradicting the facts, authority and arguments submitted by Union Park, it cannot be said that the District Court abused its broad discretion in denying the Motion.

B. Gump & Ayers' delay in filing its Motion to Amend is not excusable.

In its brief, Gump & Ayers argues extensively that it believed, since the inception of this action, that it had been the victim of a fraud. However, Gump & Ayers and its counsel go on to argue that they felt constrained, by the requirements of Rule 11, Utah Rules of Civil Procedure, to investigate the issue further before raising allegations of fraud. These statements, and this argument, are unsupported by the record. Gump & Ayers has been represented by the same counsel since the inception of this action. The record is clear that Gump & Ayers and its counsel have always felt that this was their only defense to Union Park's action. (See, Affidavit of Jerry Floor at Paragraph 18) (R. 195).

Gump & Ayers would also have this Court believe that it finally learned of this fraud and promptly filed its Motion for Leave to Amend. Gump & Ayers argues:

> On March 21, 1992, Gump & Ayers filed a Motion to Amend its Answer to assert a Counterclaim alleging the fraud which was now confirmed. (Emphasis added).

This statement is somewhat misleading. The record establishes that the "confirmation" to which Gump & Ayers refers is a copy of the Lease Agreement between Union Park and the substitute tenant, Matrix, Inc. This lease was produced to Gump & Ayers with Union Park's responses to their discovery requests, which responses were delivered on January 14, 1991, five (5) weeks before Union Park filed its Motion for Summary Judgment and over two (2) months before Gump & Ayers filed its Motion for Leave to Amend (R. 19). The record also establishes that Jerry Floor, President of Gump & Ayers, was aware of the circumstances which gave rise to his allegation of fraud, as far back as November 5, 1990. There is correspondence in the record, of that date, in which Mr. Floor sets forth all of the factual allegations which he now states constitute the basis of Gump & Ayers' claim of fraudulent inducement (R. 275).

In summary, while Gump & Ayers may argue that it felt restrained by Rule 11 from alleging fraud until such time as it had confirmation, this position is not supported by the record. On the contrary, the only evidence placed before the District Court was

that introduced by Union Park, all of which evidence supports Union Park's position that the information upon which Gump & Ayers bases its allegation of fraudulent inducement was known to it long before it filed its Motion for Leave to Amend. In light of this unexcused and unexplained delay, the District Court properly denied the Motion for Leave to Amend. See, Westley vs. Farmers Ins. Exchange, 663 P.2d 93 (Utah 1983).

C. The District Court gave full consideration to all evidence of fraud, properly ruled that the evidence of fraud was insufficient as a matter of law, thereby rendering Defendant's Motion for Leave to Amend moot.

Gump & Ayers now argues that denial of its Motion for Leave to Amend to include a claim for fraud prejudiced it because "the denial of the motion effectively removed all evidence of fraud from consideration by the lower court" (Appellee's Brief at Page 20). This argument is clearly contradicted by the record. To rebut this contention, a brief review of the procedural posture of the case is necessary.

Though Union Park's Motion for Summary Judgment was filed sixty (60) days prior to Gump & Ayers' Motion for Leave to Amend, both Motions were noticed-up for argument and decision on January 10, 1992. At the hearing of January 10, 1992, the Court specifically stated as follows:

> The matter comes before the Court today on Plaintiff's Motion for Summary Judgment.

> There is also pending Defendant's Motion to Amend its Answer and assert a Counterclaim.

(Addendum Exhibit "C" at Page 1). The Court went on to state that it believed the issues relevant to both the Motion for Summary Judgment and the Motion for Leave to Amend were intertwined (Addendum Exhibit "C" at Pages 2 and 3). Counsel for Gump & Ayers stated his agreement, on the record, that the arguments were intertwined and that argument on the Motion for Summary Judgment would resolve all issues before the Court.

> Mr. McDonald: I think if we can hear the Motion for Summary Judgment, and then if the Court can open that up, I think Summary Judgment is going to really resolve everything. They are all related to that.

(Addendum Exhibit "C" at Page 4).

Appellant's only defense to the enforceability of the Promissory Note that it admitted signing, was the affirmative defense of fraud in the inducement. Consequently, the entirety of Mr. McDonald's argument at the hearing of January 10, 1992 was devoted to the issue of the alleged fraud, which Gump & Ayers now disengenuously argues was never considered by the Court. (Addendum Exhibit "C" at Pages 20-24 and 33).

Finally, the District Court made it perfectly clear that it had given full consideration to Gump & Ayers' arguments of the alleged fraud. The Court stated in its ruling "Frankly, I have given the fraud claim <u>considerable</u> thought" (emphasis added) (R.

437). The Court then went on to deny Gump & Ayers' Motion for Leave to Amend as being moot in light of the fact that it granted Plaintiff's Motion for Summary Judgment. After concluding, as a matter of law that Gump & Ayers had not met its burden to show fraud, the Court stated that it would make no sense "to turn around and say, "okay, now, amend your answer and include the counterclaim on this very issue"..." (R. 443). The Court reiterated its position in response to Mr. McDonald's question about the denial of Gump & Ayers' Motion for Leave to Amend.

> Mr. McDonald: The problem I have, if the Motion to Amend is not granted, then fraud isn't before the Court on Summary Judgment.
>
> The Court: Well, you defend [sic] it on that basis and I considered it in that context. It was a pending motion I reserved on that. I indicated that I had read all of the pleadings about it. Motion to amend is denied.

(R. 443).

Thus, Gump & Ayers' contention that it was prejudice by denial of its Motion for Leave to Amend is unsupported by the record and meritless. Denial of the Motion did not prevent the Court from considering evidence of alleged fraud in the context of Union Park's Motion for Summary Judgment. Gump & Ayers' allegations of fraud were at the very heart of its opposition to the Motion for Summary Judgment. The Court having found that Gump & Ayers did not meet its substantive burden on the allegations of fraud, properly

granted Union Park's Motion for Summary Judgment. The Court then correctly decided that Gump & Ayers' Motion for Leave to Amend was therefore moot and properly denied Appellant's Motion. These rulings should be upheld by this Court.

POINT III

THE DISTRICT COURT PROPERLY RULED THAT INTEREST ON THE PROMISSORY NOTE WAS TO BE CALCULATED AT THE RATE OF 10% PER ANNUM

At the hearing of January 10, 1992 on Plaintiff's first Motion for Summary Judgment, Judgment was granted in favor of Union Park on the issue of liability. The Court reserved for further proceedings the issues regarding determination of the appropriate interest rate to be used in calculating the balance due and owing on the Note. The Court also reserved for further proceedings the propriety of attorney's fees as an element of damages (R. 470, 471). These issues were addressed by Plaintiff's Second Motion for Summary Judgment filed on August 25, 1992 (R. 474). Union Park's Second Motion for Summary Judgment was supported by a Memorandum, as well as the Affidavit of Thomas Lloyd in support thereof (R. 477 and 502). After obtaining an extension, Gump & Ayers filed a Memorandum in Opposition supported by the Affidavit of Jerry Floor (R. 549 and 553). Gump & Ayers also filed a Cross-Motion for Summary Judgment on the issue of the propriety of calculating the note interest at the rate of 10% per annum (R. 566). Oral argument

on the cross-motions was held on November 30, 1992. The Court granted Union Park's Motion for Summary Judgment on these issues and denied Gump & Ayers' Cross-Motion (R. 606). The Court properly ruled that interest on the note was to be calculated at the rate of 10% per annum.

Union Park presented evidence through the Affidavit of Tom Lloyd (R. 502) of the principal balance which remained due and owing under the Note, which evidence was unopposed. Union Park also presented evidence supporting its claim to late fees and attorney's fees. Union Park prevailed on all of these issues (R. 606), none of which were appealed by Gump & Ayers.

However, Gump & Ayers continues to resist the ruling of the Court that interest on the undisputed unpaid balance is to be calculated on a per annum basis.

It is undisputed that the language of the Note provides for interest at the rate of 10% (R. 8). Relevant portions of the Note read as follows:

> This Note shall bear interest at the rate of 10% from and after May 1, 1988. Said sum shall be due and payable to the holder hereof in eighteen (18) monthly payments of principal in the amount of $3,055.55, plus accrued interest as of the date of each such payment.

(Addendum Exhibit "B"). The dispute arose as to the period over which the interest should be calculated. In response to Union Park's Motion for Summary Judgment and in support of its own Cross-

Motion for Summary Judgment, Gump & Ayers argued that interest was to be calculated at the rate of 10% per every forty-two (42) months (R. 569) which it calls a "flat rate". Union Park argued that 10% was to be calculated as a per annum interest rate (R. 580) based upon application of § 15-1-3, Utah Code Ann. (1953 as amended).

The Court clearly ruled that the Note does not state the time period over which interest is to be calculated.

> And in this particular case, the language that is relevant to the interest rate makes no mention of a per annum interest rate. It doesn't make mention of a flat rate interest rate either. I don't think there is any ambiguity about that contract in and of itself, just that it's missing a term.

(R. 744, also Addendum Exhibit "D"). In supplying the missing term, the District Court properly inserted the term "per annum" into the contract.

There is a Utah statute which prescribes the period over which interest is to be calculated when none is stated. In that situation, a per annum interest rate is required under § 15-1-3, Utah Code Ann., (1953 as amended), which provides:

> Whenever in any... instrument... any certain rate of interest is mentioned and no period of time is stated, interest shall be calculated at the rate mentioned by the year. (Emphasis added).

Research reveals no cases which have cited or interpreted § 15-1-3. However, the State of Oklahoma has a statute which is

analogous to the Utah statute which has been interpreted by the Oklahoma Supreme Court. The Oklahoma statute reads in its entirety as follows:

> When a rate of interest is prescribed by a law or contract, without specifying the period of time by which such rate is to be calculated, it is to be deemed an annual rate.

Okla. Stat. Ann. Tit., 15 § 265.

This statute was interpreted by the Supreme Court of Oklahoma in the case of Jackson vs. Fennemore, 230 P. 689 (Okla. 1924), in which enforcement was sought of a promissory note which accrued interest at the rate of "...10% interest from date". Like the Note before this Court, it specified the percentage rate of interest and the date after which interest was to accrue. However, it did not specify the period pursuant to which the 10% rate was to be calculated. Id. at 690. This is identical to the present case in which the Note provides for interest at the rate of 10% and a date certain after which it is to accrue (May 1, 1988) (R. 8). Under these circumstances, the Supreme Court of Oklahoma determined that no period for calculation was provided in the note and it relied on the statute cited above in ruling that interest was to be calculated on a "per annum" basis. The court specifically stated:

> This [referring to 15 § 265] we think is decisive of the question raised, and is ample to justify the court in rendering judgment for 10% per annum... (Emphasis added).

Id. at 691.

The District Court properly determined that the period over which the 10% interest was to be calculated was a missing term (R. 744). The Court then noted that generally a court will not insert missing terms into a contract, as a matter of law. However, it will make such an insertion when the legislature, through statutory enactment, has mandated a particular term to be inserted. Thereupon, and in reliance on § 15-1-3, the Court ruled that interest was to be calculated at the rate of 10% per annum. The court specifically stated:

> As I look at the statute, and looking at this Promissory Note, it appears to me that the Plaintiff's position is well taken. That the statute does control in this case, does provide the court a justification for inserting a term in the contract. The parties are not entitled to a better contract than the one that they entered into, and generally courts do not imply terms or read terms or add terms to a contract. But in this case, I think the legislature has done just that.

(R. 745, also Addendum Exhibit "D"). The District Court properly applied the statute to supply the missing term, since contracts are presumed to incorporate within their terms law existing at the time the contract is entered into. McKinley vs. Prudential Property and Cas. Ins. Co., 619 P.2d 1269 (Okla. App. 1980), Beehive Medical Electronics, Inc. vs. Industrial Com'n, 583 P.2d 53 (Utah 1978) and

Quagliana vs. Exquisite Home Builders, Inc., 638 P.2d 301 (Utah 1975).

The Note states the percentage interest rate of 10%. The Note also states the date on which interest begins to accrue (May 1, 1988). However, the Note does not state the time period over which interest is to be calculated. There is no possible way to interpret the Note and make sense of all of its remaining provisions if a "flat" rate is imposed. Appellant offers no method of calculating a "flat rate" nor offers how its interpretation is consistent with the other provisions of the Note. However, by inserting the "per annum" period prescribed by § 15-1-3, the Note makes sense. It makes the following language of the Note consistent and logical:

> Said sum shall be due and payable to the holder hereof in eighteen (18) monthly payments of principal in the amount of $3,055.55 plus accrued interest as of the date of each such payment. (Emphasis added).

(Addendum Exhibit "B"). The Utah statute prescribes that, if such a term is missing, interest is to be calculated on an annual basis. Therefore, the Court's ruling that the "period" term of the Note was missing was proper and the Court correctly ruled that interest on the undisputed unpaid principal should be calculated on a per annum basis. This ruling should be affirmed by this Court.

CONCLUSION

This Court should affirm the two rulings of the Third Judicial District Court in favor of Plaintiff Union Park Associates in connection with its Motion for Summary Judgment. First, this Court should conclude that the District Court properly found Gump & Ayers liable under the Settlement Agreement and Promissory Note. In so doing, this Court should affirm that the District Court properly applied the substantive burden test by resolving all disputes of fact in favor of Gump & Ayers and thereafter finding that Gump & Ayers still failed to show fraud by clear and convincing evidence, thereby failing to raise a material issue to defeat Summary Judgment. Even if this Court declines to adopt the substantive burden test, it should still affirm the ruling on liability as Gump & Ayers still failed to raise a material issue of fact.

Second, this Court should find that the District Court properly considered Gump & Ayers' allegations of fraud and properly denied its Motion for Leave to Amend.

Third, this Court should affirm the ruling of the District Court granting damages in favor of Union Park and specifically finding that interest under the Promissory Note should accrue at a rate of 10% per annum. In so doing, this Court should affirm the Order and Judgment (R. 606) wherein Plaintiff was awarded Judgment as against Defendant in the amount of $35,175.59 as of July 9,

1990, with interest accruing thereon at the rate of 10% per annum thereafter until paid in full, together with the award of attorney's fees and costs in the total amount of $7,220.50, plus interest thereon at the contract rate of 10% per annum from the date of entry of Judgment until paid in full.

Further, Union Park Associates is entitled to its attorney's fees and costs pursuant to the Note between the parties. Therefore, this matter should be remanded to the District Court for determination and award of additional costs and additional attorney's fees incurred in responding to this Appeal. (See, G.G.A., Inc. vs. Leventis, 773 P.2d 841 (Utah App. 1989)). Finally, Gump & Ayers has posted a Supersedeas Bond pursuant to which Union Park Associates is stayed from execution pending outcome of this Appeal. That Stay should be lifted and the Bond should be released to Union Park Associates forthwith.

DATED this 25th day of May, 1993.

RICHER, SWAN & OVERHOLT, P.C.

Mark S. Swan
Attorney for Plaintiff/Appellee
Union Park Associates

CERTIFICATE OF SERVICE

I hereby certify that on the 25 day of May, 1993, I caused a true and correct copy of the foregoing to be served upon the following parties by placing the same in the United States mails, postage prepaid, addressed as follows:

Robert M. McDonald
McDONALD, WEST & BENSON
Attorneys for Defendant/Appellee
455 East 500 South
Suite 200
Salt Lake City, Utah 84111

Mark E. Medcalf

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EXHIBIT "A"

SETTLEMENT AGREEMENT
AND
MUTUAL RELEASE OF CLAIMS

This Settlement Agreement and Mutual Release of Claims is entered into this 7th day of December, 1988, by and between Union Park Associates (hereinafter, "Union Park") and Gump & Ayers Real Estate, Inc. (hereinafter, "Gump & Ayers").

1. On June 28, 1985, Union Park, as landlord, and Gump & Ayers, as tenant, entered into a certain Lease Agreement for the lease of approximately 912 sq. ft. of the second floor of the office building located at approximately 1150 East Fort Union Boulevard, Midvale, Utah. That Lease Agreement provides for a term of eight years and eight months. A copy of said Lease is attached hereto as Exhibit "B"

2. On June 1, 1983, Union Park, as landlord, and Gump & Ayers, as tenant, entered into a certain Lease Agreement for the lease of approximately 4,567 sq. ft. of the second floor of the office building located at approximately 1150 East Forth Union Boulevard, Midvale, Utah. That Lease Agreement provides for a term of ten years and eight months. A copy of said Lease is attached hereto as Exhibit "C".

AGREEMENT AND RELEASE OF CLAIMS

In consideration of the mutual promises set forth below and with the intent of being legally bound, the parties hereto agree as follows:

3. Payment. Upon execution of this Agreement, (a) Gump & Ayers will pay to Union Park the sum of Ten Thousand Dollars ($10,000); (b) on December 15, 1988, Gump & Ayers will pay to Union Park an additional sum of Ten Thousand Dollars ($10,000); in addition, (c) Upon the execution of this Agreement Gump & Ayers will execute and deliver to Union Park a Promissory Note in the form attached hereto as Exhibit "A", and will pay to Union Park the additional sum of Fifty-Five Thousand Dollars ($55,000) on the terms, and in the manner, set forth in said Promissory Note.

4. Mutual General Releases. (a) For and in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Union Park, for itself, its successors and assigns, does hereby fully and forever release, acquit and discharge Gump & Ayers, its successors, assigns and any others who have acted or who are acting on its behalf, from any and all claims, demands, obligations, liabilities, causes of action or any suits at law or equity, whether known or unknown to Union Park, which Union Park may have against Gump & Ayers which claims arise from any act or omission of Gump & Ayers committed prior to the date of this Agreement, the Lease Agreements specified in

Paragraphs Nos. 1 and 2, above, the occupation of the leased premises by Gump & Ayers and/or the use of the leased premises by Gump & Ayers.

(b) For and in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Gump & Ayers, for itself, its successors and assigns, does hereby fully and forever release, acquit and discharge Union Park, its successors, assigns and any others who have acted or who are acting on its behalf from any and all claims, demands, obligations, liabilities, causes of action or any suits at law or equity, whether known or unknown to Gump & Ayers which Gump & Ayers may have against Union Park which claims arise from any act or omission of Union Park, the Lease Agreements specified in paragraphs Nos. 1 and 2, above, the occupation of the leased premises by Gump & Ayers and the use of the leased premises by Gump & Ayers.

5. Rescission of Lease. For the consideration of the covenants contained herein, the parties agree that the lease agreements specified in paragraphs nos. 1 and 2, above, are hereby mutually rescinded and that except as provided in this agreement, both parties are hereby released from any and all obligation contained within said lease agreements.

6. Default. In the event Gump & Ayers shall default in a payment of $10,000.00 due on December 15, 1988 as set forth in paragraph 3 above, such payments shall be subject to a late charge at a rate equal to 18 percent per annum until paid. Any default in the payment of any sum set forth in the Promissory Note shall be subject to the late fee as set forth within the Promissory Note. In the event either party defaults in the performance of any term of this Agreement, the defaulting party agrees to pay all reasonable attorney's fees and court costs incurred by the non-defaulting party.

The mutual releases contained herein and the mutual recision of the Lease Agreements contained herein are dependant upon the full performance by Gump & Ayers of its obligations contained in this Agreement and contained in the Promissory Note. In the event Gump & Ayers defaults in any of its obligations set forth in this Agreement or the performance of any obligation set forth in the Promissory Note, Union Park Associates shall be entitled, by its election, to retain all funds received prior to the default and to either (1) its actual damages under the Lease Agreements less all funds received under this Agreement and Promissory Note prior to the default or (2) the full consideration as provided in this agreement and the Promissory Notes.

7. Union Park and Gump & Ayers acknowledge that this

compromise and release has been entered into freely and with the advice of counsel and that no representations of fact or opinion has been made by either party or by anyone acting in their behalf to induce this compromise with respect to the nature of their claims and damages.

DATED this 7th day of ~~November~~ DECEMBER, 1988.

UNION PARK ASSOCIATES

By Thomas M Lloyd

GUMP & AYERS REAL ESTATE, INC.

By Jerry A. Doan
President

ld uniogump.rel

EXHIBIT "B"

PROMISSORY NOTE

$55,000.00
Principal Amount

December ~~November~~ 7, 1988

FOR VALUE RECEIVED, the undersigned hereby promises to pay to the order of UNION PARK ASSOCIATES, 6925 Union Park Center, Suite 500, Midvale, Utah 84047, the sum of FIFTY FIVE THOUSAND AND NO/100 DOLLARS ($55,000.00). This note shall bear interest at the rate of ten percent (10%) from and after May 1, 1988.

Said sum shall be due and payable to the holder hereof in eighteen (18) monthly payments of principal in the amount of $3,055.55 plus accrued interest as of the date of each such payment.

Said payments to be made as follows: Payments shall commence on May 1, 1989 and continue thereafter, on the first day on each successive month, through and including the month of October, 1989. No payment shall be due for the months of November, 1989 through April, 1990. Thereafter, payments shall be due, as stated above, commencing on May 1, 1990 and continuing thereafter, on the first day of each successive month through and including the month of October, 1990. No payment shall be due for the months of November, 1990 through April, 1991. Thereafter, payments shall be due as stated above, commencing on May 1, 1991 and continuing thereafter on the 1st day of each successive month until all principal and accrued interest is paid in full.

This note may be prepaid in whole or in part without penalty.

This note shall at the option of any holder hereof be immediately due and payable upon the occurrence of any of the following:

1. Failure to make any payment due hereunder within 15 days of its due date.

2. Breach of any condition of the Security Agreement on property granted as collateral or security for this note.

3. Upon the filing by the undersigned of an assignment for the benefit of creditors, bankruptcy, or for relief under any provisions of the Federal Bankruptcy Code; or by suffering an involuntary petition in bankruptcy or receivership to be filed and not vacated within 30 days.

In the event this note shall be in default, and placed with an attorney for collection, then the undersigned agrees to pay all reasonable attorney fees and costs of collection. Payments

not made within five (5) days of due date shall be subject to a late charge of 1.5% of said payment. All payments hereunder shall be made to the address set forth above or to such address as may from time to time be designated by any holder hereof.

The undersigned agrees to remain fully bound hereunder until this note shall be fully paid. The undersigned further waives demand, presentment and protest and all notices thereto and further agrees to remain bound, notwithstanding any extension, modification, waiver or other indulgence by any holder or upon the exchange, substitution, or release of any collateral granted as security for this note. No modification or indulgence by any holder hereof shall be binding unless in writing; and any indulgence on any one occasion shall not be an indulgence for any other future occasion. The rights of any holder hereof shall be cumulative and not necessarily successive. This note shall be construed, governed and enforced in accordance with the laws of the State of Utah.

This note is subject to a Security Agreement of even date.

GUMP & AYERS REAL ESTATE, INC.

By _____
JERRY FLOOR, President

ld uniogump.not

EXHIBIT "C"

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

UNION PARK ASSOCIATES Plaintiff, vs. GUMP & AYERS REAL ESTATE, INC. Defendant.	Transcript of: HEARING Case No. 900906725

* * * * *

The above-entitled cause of action came on regularly for hearing before the Honorable Anne M. Stirba, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake County, Utah, on Friday, January 10, 1992.

APPEARANCES

For the Plaintiff: MARK S. SWAN
RICHER, SWAN & OVERHOLT
311 South State #350
Salt Lake City, Utah

For the Defendant: ROBERT M. MCDONALD
MCDONALD & BULLEN
455 East 500 South #200
Salt Lake City, Utah

FRIDAY, JANUARY 10, 1992 2:00 P.M.

PROCEEDINGS

THE COURT: Good afternoon. Let's go on the record in the matter of Union Park vs. Gump & Ayers Real Estate, Incorporated, case No. 900906725. Counsel, would you state your appearances.

MR. SWAN: Mark Swan representing the plaintiff, Union Park Associates.

MR. MCDONALD: Robert McDonald representing the defendant, Gump & Ayers.

THE COURT: All right, thank you. The matter comes before the Court today on the Plaintiff's Motion for Summary Judgment. There is also pending Defendant's Motion to Amend its Answer and Assert a Counterclaim. There is a Motion for Relief in Judgment which the plaintiff filed following the Court's ruling, I believe, on July 18 of 1991.

I indicated by way of minute entry that I would reconsider that motion for the reason that although the docket sheet indicated that a Memorandum in Opposition had been filed by the plaintiffs, that the memorandum was not a part of the file and consequently was not considered by the Court at the time I issued that ruling on July the 18th. So I would reconsider that. I indicated by way of minute entry that I would.

I presume that the parties haven't been able to reach some kind of an agreement about that; is that correct?

MR. SWAN: Well, Your Honor, our Motion to Reconsider your order granting the Motion to Amend has not been opposed.

THE COURT: Right.

MR. SWAN: So I presume that there is no problem with that. I think it is a court clerical error that the order was ever entered because clearly the memorandum was on file and for somehow it got lost because it had never been put on the computer.

THE COURT: I have already said I am going to reconsider it, but I was wondering, I presume there has been no agreement then with respect to the Motion to Amend the amendment?

MR. SWAN: That is correct, there has not been.

THE COURT: All right.

MR. MCDONALD: I think it is still disputed and we will address that.

THE COURT: Still seems very much in dispute. What we are going to do today with that is I am going to reserve ruling on that particular issue until after argument on the Motion for Summary Judgment. I don't think we need to rule to have argument specifically with

the Motion to Amend. I am aware of how the issues intertwine. I would like you to argue the Motion for Summary Judgment. I have read all of the affidavits. I have read your memoranda on that, and you may proceed.

MR. SWAN: Thank you, Your Honor. Your Honor, if it please the Court, I am going to stand here because I have so many documents that I may need to refer to in this oral statement.

THE COURT: Just as long as Dorothy can hear you and I can hear you.

MR. SWAN: Okay. Well I usually talk loud enough. It is usually too fast, so I will try to keep it slow.

I think it is important in conjunction with this whole matter, because I think there are six motions before the Court, to understand the timetable of the pleadings and procedure in this matter.

THE COURT: Six motions?

MR. SWAN: I think so, yes.

THE COURT: I think there is the Motion for Summary Judgment, Motion to Amend, and then the Motion for Consideration to Relief of Judgment. I am not aware of other motions.

MR. SWAN: There is Motions to Strike Affidavits, Motions for Protective Order, Motions to

Compel, and all of these things are part and parcel, really, of the controversy surrounding the Motion for Summary Judgment.

THE COURT: When was the Motion to Strike -- Oh, the affidavit of John Parsons.

MR. SWAN: That is correct.

THE COURT: All right, very well.

MR. SWAN: Anyway, if I may --

THE COURT: Was there a Notice to Submit submitted on the Motion to Compel?

MR. SWAN: I think this is the Defendant's Motion to Compel. I am not sure whether there was or not.

MR. MCDONALD: The way that arose, Your Honor, is we submitted some discovery and I believe there was a motion that inasmuch as the summary judgment was pending, that they ought not to have to answer that until the disposition of the motion, if I recall correctly. And basically I think we are really just here. I think if we can hear the Motion for Summary Judgment, and then if the Court can open that up, I think the summary judgment is going to really resolve everything. They are all related to that.

THE COURT: All right, go ahead.

MR. SWAN: Thank you, Your Honor. As the Court

is probably well aware, the complaint in this matter was filed on November 14, 1990, a little over a year ago. It was served on November 23rd. The defendants filed an Answer on December 13th. With their Answer, they filed their first set of Interrogatories and Requests for Production of Documents. And then my client responded to those and the responses were filed or the Certificate of Service was filed January 10th, so within the 30-day period. Nothing happened after that response to the discovery and so on February 21st, 40 days later or so, we filed a Motion for Summary Judgment. Thereafter, a month later --

THE COURT: I believe it was January, not February, but go ahead, I thought it was.

MR. SWAN: Motion for Summary Judgment?

THE COURT: Well, never mind. It doesn't matter.

MR. SWAN: My motion says February 21st.

THE COURT: Okay, you are right.

MR. SWAN: So some time period passed from our Answer to the motion, and I think that becomes relevant if we ever get to the Motion to Amend issue because there was plenty of time for the defendants to amend their pleadings before filing a Motion for Summary Judgment.

They responded to our Motion for Summary

Judgment on March 21st, and at the same time filed a Motion to Amend on the same date.

Our Motion for Summary Judgment, I think, is quite straightforward. And I realize the Court has just an enormous amount of paper and, to be honest with you, part of that was done to help educate the defendant as to the numbers behind this whole case; but I think the legal issues are quite easy.

What is at issue is whether or not the defendant is liable under a promissory note which was executed as part of the whole Settlement Agreement package. The promissory note was executed on December 8, 1988 in a principal amount of $55,000. It bears interest at 10 percent and it has an interesting payment schedule: 18 payments of $3,055.55, but they're not monthly payments. They are skip-months in there and those payments are identified as principal payments. The way the note is written, in addition to the principal payments, you are supposed to pay accrued interest with that payment as of the date of the payments.

The Settlement Agreement was executed because the defendant had entered into a commercial lease agreement with the plaintiff to lease premises at Union Park in Midvale. And there are two leases, one was eight years and one was ten years on two separate suites. They

vacated the premises in May of 1988, leaving at least six years left on the lease. A Settlement Agreement was finally executed eight months after they vacated the premises and there was eight months' rent due at the time. The rental payment due at the time on the total amount of premises being leased by the defendant was $7,733.37.

The Settlement Agreement says that the parties are releasing each other of all of their rights and obligations under the lease agreement and for any number of known claims in exchange for the defendant paying the plaintiff a total of $65,000: $10,000 down, and execution of a promissory note.

At the time of the execution of that promissory note and Settlement Agreement, the total amount due in past due rent was $61,866.96. And so what the defendant was agreeing to do was pay the $65,000: pay $61,000 for past due rent, and a small portion for future liability, slightly over $3,000.

Their potential liability under the lease was a half million dollars.

THE COURT: You are just saying that that is accord and satisfaction?

MR. SWAN: That is correct.

THE COURT: Okay.

MR. SWAN: Now the defendant does not dispute the most recent accounting submitted by a supplemental affidavit of Tom Lloyd regarding the amount due under the promissory note. In their initial response, they provided evidence of some payments that we have now taken into account and have filed a supplemental accounting and have come up with a figure that is due under the promissory note of $35,352.46 as of July 16, 1990.

We have also filed an affidavit of fees and costs through June 6, 1991 of $4,083.50.

THE COURT: How much was that?

MR. SWAN: $4,083.50. Now some additional fees and costs have been incurred since that date.

Their defense to liability is not that they didn't sign the note or not that they paid in full. In fact, they admit that they have not paid in full: but it is fraud in the inducement. That is the term that they used. And their own Memorandum in Opposition says that "In order to induce Gump & Ayers to pay a sum of money for future rents, plaintiff falsely stated to Gump & Ayers the leased premises were still vacant, with no prospect of future tenants." So that is the allegation of fraud in the inducement, that they were induced to pay this $3,100 for future rents by the statement that the premises were vacant. We believe that this defense is

not well supported either at law or by the evidence that they have raised.

First of all, we think the Settlement Agreement expressly waives each and every claim, including this claim that they were not told about the current status of the tenancy of the property. Secondly, we do not think that their fraud in the inducement claim is sufficiently pled by law because they have not pled each of the elements. Nor have they shown by the clear and convincing evidence requirement that they have, that there was a fraud.

Settlement Agreements such as were entered into in this matter, have been construed quite often by the Utah Court and by other courts, and they have all been said to be favored at law. They are valued because they resolve disputes that have unliquidated liability, such as was with this case. There was not a very good ability to determine the defendant's continuing liability on the lease and so Settlement Agreement liquidated that liability.

The case law also suggests, as cited in our memorandum, that in order to set aside the Settlement Agreement, the very strongest reasons must be shown and only by clear and convincing evidence. If I might refer to the Settlement Agreement, there are two paragraphs I

think are quite important. First is found in paragraph 4(b) which says, "Gump & Ayers for itself, its successors and assigns does hereby fully and forever release, acquit and discharge Union Park and its successors, assigns, and any others who have acted or who are acting on its behalf from any and all claims, demands, obligations, liabilities, causes of action, or any suits at law or equity, whether known or unknown to Gump & Ayers, which Gump & Ayers may have against Union Park."

Also in the same Settlement Agreement, paragraph 7 says, "The Union Park and Gump & Ayers acknowledge that this compromise and release has been entered into freely and with the advice of counsel and that no representations of fact or opinion has been made by either party or by anyone acting in their behalf to induce this compromise with respect to the nature of their claims and damages."

So on the one hand we have Gump & Ayers saying we haven't relied on anything that Union Park has said in entering into this compromise agreement; but now when they have been asked to pay, they are saying they have been fraudulently induced to enter into it and in fact they have relied. I think those statements are inconsistent and by signing a contract that says they didn't rely, they cannot now change their mind and say,

"We did rely." I think it is also important that they are a sophisticated company. They admit they had advice of counsel and were fully informed.

The fraud by which the defendant is alleging that the plaintiff committed must be pled with particularity. Fraud in the inducement have four elements as identified in our memorandum. False representation, which is known to be false, or an omission of a material fact to induce action, and actual and justifiable reliance. And this must be known by clear and convincing evidence even in contesting a Motion for Summary Judgment.

The only false representation that is raised by this defendant is raised by Jerry Floor's affidavit in paragraph 7 where he says it was falsely represented to him that the property was vacant. They have not raised any fact that shows that the property was not vacant at the time that he alleges the representation was made.

THE COURT: So your position is that can't be fraud in the inducement?

MR. SWAN: That is correct.

THE COURT: Even if true?

MR. SWAN: Correct, because he is saying, "I relied on the fact that it was vacant." If it was vacant, there has been no misstatement, no misleading

statement. The uncontroverted facts are the property was vacant at the alleged time that the statement was made and it did not have any occupancy until January of the following year.

But I think more importantly than whether it was true or false, was it is not a material fact because to be material it has to have some effect upon the negotiations or the agreement between the parties. And they have not shown in any way how this could have changed their decision-making process at all.

THE COURT: All right now, that statement that Floor makes that he was told that the property was vacant, tell me what time period exactly you are talking about?

MR. SWAN: Mr. Floor says in his affidavit that in discussions in November of 1988 at the time the Settlement Agreement was being discussed, that he was told that the property was vacant. And in fact, it was vacant at that time. So we believe that, in fact, he was told truthfully that it was vacant. But secondly, it is not -- even if it wasn't vacant, it is not material when you see the whole scope of the Settlement Agreement. It has no -- that statement has no bearing on the liquidated amount that was agreed to and owing for past due rents. At most, it had some effect on what they were agreeing to

pay for future liability. And the facts are clear that they only agreed to pay $3,100 on future liability to get release from a potential half million dollars of liability. There is no showing that that statement would have had any effect on their decision to pay $3,100 for future rents. In fact, four-tenths of a month's rent is what they agreed to pay to compromise their future liability.

Now, there is some implication that the plaintiff should have told the defendant that they were negotiating for a new tenant and thereby, although it is not explicitly stated, that maybe Union Park had a duty to speak and to keep the defendant informed of these other negotiations for tenancy of the property.

THE COURT: Well, if I understand you correctly, Mr. Swan, your position is not only is there no duty but, in fact, if anything, there was a duty to try to mitigate, is that right, damages by attempting to re-let the property?

MR. SWAN: That is correct. The case that says that there is a duty to mitigate is, I think, it is Reed vs. Mutual of Omaha case which didn't come down until after the Settlement Agreement. And so it wasn't clear in the State of Utah whether there was an actual duty to mitigate, but at least the plaintiff was doing something.

And a duty to speak requires that there must be either a fiduciary duty between the parties or a capacity to assert undue influence or duty created by statute.

Now the defendant hasn't said that there is a fiduciary duty. There are not facts alleged that there was a fiduciary duty. In fact, the party's position was adversarial. The defendant owed the plaintiff money and they were trying to resolve a conflict. That is not fiduciary.

There was no ability to assert undue influence, I don't believe. Both parties represent that they had counsel. They were relying on their own understanding of the situation. There is no facts alleged that there is undue influence alleged, and there is clearly nothing that suggests that statute creates a specific duty to keep the plaintiff informed.

So I think that -- When you look at the standard of a Rule 56 Motion for Summary Judgment, there must be a genuine issue of material fact, and we don't believe that this fact that the defendant has raised has any materiality at all. They have not shown materiality. They have not shown how it affected their decision, as fraud allegations must do. And so we believe that we have an enforceable accord and satisfaction. They admit they have defaulted under that accord and satisfaction.

They do not dispute the amount that is due.

Attorney's fees are allowed under the note. The accord and satisfaction waives the very claim that they are now making that they were not relying on representations, where in fact now they are alleging they were doing so. And most basically, there is just no evidence. They have not brought forth any evidence to show fraud in the inducement. They have just alleged that some statement was made and have not fulfilled their legal duty to make those specific facts.

And I think it is quite clear that we could not have fraudulently induced them to agree to pay the past due amount. They owed it. They couldn't be fraudulently induced to pay that amount. And so that amount is quite obviously due, and that was $61,866.96. The date they signed the Settlement Agreement, they owed that much. So at most, if they were induced fraudulently with regard to any dollar figure, it is the difference between that amount and the 65,000, which they agreed to pay, or $3,100.

THE COURT: Well, you are not suggesting you can divide that out, separate that out, are you?

MR. SWAN: Well, their specific allegation is that we were fraudulently induced to pay a sum on the future rents; and so I think it needs to be clear that

they can't escape liability on the past due amount, because they haven't alleged that they were fraudulently induced to pay the past due amounts.

THE COURT: Maybe I am missing something, but you've moved for summary judgment on liability asserted by way of the promissory note, correct?

MR. SWAN: That is correct.

THE COURT: Okay. And included in that, according to what you are telling me, is the 61,000-some-dollars on the past due amount which they say they owe, they admit they owe, and then the balance is whatever they were negotiating for to avoid future obligations, correct?

MR. SWAN: That is correct.

THE COURT: But in the context of the Motion for Summary Judgment, you are not suggesting that if I find that they were in fact liable for, or that I should find that they were in fact liable for, $61,000 and somehow there is a question as to the balance, you are not suggesting that, are you?

MR. SWAN: No. What I am trying to suggest is that the issue of fraudulent inducement, at most, only goes to what they may have owed on future rents. And so when you look at it in that light, that brings up the materiality issue and it is just not material because

their liability was so large, a half million dollars, that they have not shown anything that would have suggested that agreeing to pay an extra $3,100 would have changed their decision one way or another. And so I think it goes to whether that is a material fact or not. And so that is the reason I raise that. I just think that this whole lawsuit, they are trying to escape liability, if you read their Answer and their Counterclaim, for the full promissory note, the full settlement agreement. And I think that is somewhat of a smoke screen because they couldn't have been fraudulently induced to agree to pay something that they owed. And so there is just not the materiality that they seem to suggest. And then I will save some time for rebuttal.

THE COURT: Okay, thank you. Mr. McDonald.

MR. MCDONALD: Thank you, Your Honor. As counsel points out, Your Honor, this action was commenced on November 14, 1990. The complaint seeks recovery under a promissory note dated December 8, 1988, for the principal sum of $55,000. It is important to note that the circumstances giving rise to the execution of the note was the fact that there was a pre-existing lease between the plaintiff and defendant. At that time when Gump & Ayers entered into the lease, they were expanding their business operation later because, obviously the

real estate market they had to retract. So admittedly they terminated the lease in advance of the specified period. At or about the time the premises was vacated, they fully realized their responsibilities under the lease and they were fully advised, and there is no dispute on that.

At the time the plaintiff filed the complaint alleging liability under the note, we filed an Answer. When Mr. Floor came into my office, he noted to me some hearsay he had heard and he told me, and it is noted in the affidavit. I won't put it in terms of what he told me, but it is stated in the affidavit, that at the time he had reason to believe that he had been defrauded. That he entered into the note on the representation that the premises that he vacated, that Gump & Ayers had vacated, had not been re-let. And obviously realizing the substantial liability, he was offered by plaintiff, "Execute this promissory note and we will just waive all of this future rent that you otherwise would be obligated to pay." When he came into my office, he had reason to believe that, in fact, a lease had already been negotiated and executed at the time he signed the promissory note with the belief that he was satisfying an undefined future liability. But his basis for it was a statement he had heard at a party. Pursuant to my

obligations under Rule 11, I did not feel justified in asserting a serious claim of fraud on the basis of something he had heard at a cocktail party. So in the Answer, I specifically --

THE COURT: I am aware you reserved -- made that observation in your Answer.

MR. MCDONALD: All right. So in that circumstance, I filed the Answer and merely reserved that, not asserting it because of my Rule 11 responsibilities.

I get back a Motion for Summary Judgment, and they say, "It is a promissory note. You have admitted you executed the note, so we want judgment." So at that point in time I conduct a little informal discovery and also review the documents that they have submitted in support of this motion. It is then I discover that on November 23rd, in fact, they had re-leased the premises to a company called "Matrix" who has some overlapping directorates that are obviously are affiliated companies. So at that point in time, realizing now I have a clear claim for fraud, I move to amend my complaint. They want to lower it to a promissory note case.

THE COURT: What is the representation specifically that you allege was made that was false?

MR. MCDONALD: Representation was made that the

premises was not let and there was no prospective tenants.

THE COURT: And when was this made?

MR. MCDONALD: This was made at or about the time of the Settlement Agreement and the promissory note.

THE COURT: Wait. The representation was made that the premises were not relet?

MR. MCDONALD: That is right.

THE COURT: And who do you allege made that representation?

MR. MCDONALD: Tom Lloyd, he negotiated this on behalf of the plaintiff and he represented that the premises were not relet. And so he said, "Look, you execute this promissory note and pay me some cash, I will limit your liability because you are going to be responsible every month in the future. So we will just limit your liability by signing this note."

So my client believing that he is going to be subjected to liability for the un-leased premises that he left early, signs the note and pays the cash. Later we find out, as alleged in our Proposed Amended Answer and as we stated in our Motion for Summary Judgment, the premises had been relet about two weeks earlier. And we believe that the premises had been occupied prior to that.

In any event, the worse case scenario, the premises had been relet. So the plaintiff's statement to my client that it hadn't been relet was false. And as noted in the affidavit, we would not have entered into that promissory note and we don't agree that there is only $3,000 in this dispute. The calculations for the past rent, inasmuch as this is a promissory note case, rather than a collection of a lease case, I haven't shurned the case to answer that, but there are many disputes on how much was attributable to future rent and how much was attributable to past rents. And I think our calculations are in the affidavit.

In any event, after filing the Summary Judgment, we found that this evidence, and it is now asserted and the cases are clear, if in fact that promissory note was procured by fraud, and this fraud being that the premises were not relet and that we were going to be liable for an unspecified amount of time, it must be cured by fraud. The notion that they put into the Settlement Agreement that we didn't rely on anything, or that we are waiving and releasing each other of all rights, are still the effects of fraud. We were under the assumption of the good-faith representation that the property hadn't been relet.

Since that time there has been all kinds of

moves to prevent us from amending our complaint, and preventing us from filing affidavits because the plaintiffs don't want to hear about this fraud. But the fact of the matter is, it was reserved and should be considered by the Court.

It is quite apparent, Your Honor, that in the event -- that a fraud is a question of fact. And in our counterclaim, we have alleged with specificity, and the counterclaim is incorporated into the Answer, the precise nature of the fraud, what was said, when it was said, by whom, and that we were induced, fraudulently induced into entering into the note. And it is clear that fraud is a question of fact. There is no way that the Court sitting here without a trier of fact can resolve the issue at this time.

Apart from the fraud issue, there are other substantial questions of fact.

THE COURT: All right, if I understand you correctly then, as to fraud your claim is that the false representation was made by Mr. Lloyd at the time of the negotiations and settlement agreement. Are you claiming any other basis for fraud?

MR. MCDONALD: No, other than the fact we were told that the premises were un-leased and there was no prospect for lease, when in fact it had been leased.

That is the whole purpose for signing the note, otherwise we would have paid the past rent.

THE COURT: And you are not contending that there was a material omission in the face of a duty? Mr. Swan has argued that alternatively and I haven't heard you respond to that. How do you answer that?

MR. MCDONALD: I think in the factual picture, and again we are going without having a trial to call all of the witnesses, that obviously if one makes a statement that the premises are not relet, or even if he fell short of that, saying, "You are going to be subjected to liability for future unpaid rent," that would result then in a minimum obligation to disclose, even if it occurred at a later date that the premises had been rented.

THE COURT: Well, but Mr. Swan has argued the law states that a duty arises where there is a special relationship, fiduciary relationship, where there can be undue influence or if there is a statutory duty. Do you argue with his analysis of the law?

MR. MCDONALD: Not if it is based on duty. I am basing an omission to state a material fact on the grounds of not any fiduciary duty between the parties because they are arm's-length tenant-landlord. The problem arises --

THE COURT: There has to be an omission in the

face of a duty to speak and so they go hand in glove.

MR. MCDONALD: That is right. If there is a duty -- Let me give you, as I understand his argument, let's take a hypothetical situation where I am agreeing to sell you my car and I say, "This car is in perfect mechanical condition." And you say, "Well, I will call you in three days." Two days later I find out that the engine is seriously in need of repair and it needs an overhaul. Now, I don't have a duty to disclose that to you, had I not first said, "It is in great mechanical condition." Now, at this point in time, I have reason to believe that you are still relying on my prior representation and in that relationship, now I have a duty to disclose that in fact, by reason of my prior statement, it is untrue and you should not rely on it. It is not based upon a duty between us, but merely because I initially made a statement that now I know to be false, and I realize you might rely on it. To that extent, there would be a duty if, in fact, he made the statement that the premises are not relet and there is no prospect, if he made that before the lease, but later on November 23rd re-leased the premises, I think at that point in time he has a duty to disclose that what he told us on the prior occasion is no longer true. Rather than to sit back and benefit from our belief about what he

said that there were no prospective tenants.

Apart from the fraud issue, I think there is a dispute as to the payments made by defendant prior to discovering the fraud. That is noted in our memorandum, paragraph 7. There is another factual dispute. There are disputes concerning the computations of the amounts due and owing, assuming the note is enforceable. Those are addressed in paragraph 10 of our memorandum. There are disputes concerning the duration of the lease payments, noted in paragraph 19 of our memorandum. There are factual disputes concerning the times of negotiations of the promissory note, which may bear on the very thing we are talking about and that is in paragraph 20 of the memorandum. There are disputes as to the number and amount of lease payments, paragraph 21 of our memorandum. There are disputes as to the amount of the lease payments that were due and owing, paragraph 23 and 24 of our memorandum. There are disputes as to the offer of the Settlement Agreement on the promissory note, because there is some ambiguity in it. One says it is a per annum interest rate and the note says it is a flat rate. That is one dispute that will have to be resolved by parol evidence, which isn't appropriate for a summary judgment because it depends on what you believe. There are critical matters which defendant has not had the

opportunity to investigate that are noted in paragraph 32 and 33. And in that regard, Your Honor, we had recited the law that summary judgment is inappropriate if there are matters that one party or the other has not had an opportunity to investigate.

At this juncture, Your Honor, it seems clear that with the factual disputes for fraud in the inducement which are pled in the counterclaim with particularity, set forth in the affidavits with particularity, and the counterclaims incorporated into the answer, that there is a dispute as to whether fraud exists. If, in fact, what Mr. Floor says is true, it is apparent that the promissory note was procured by fraud. If it goes to what Mr. Lloyd says is true, maybe not, but we need a trier of fact to make that factual determination or conclusion.

There are other matters, I think, that are problems and that is conclusary statements in the memorandum. We have cited authority to the effect you just can't conclude statements without the underlying facts. That must be subjected to discovery and the testimony of witnesses.

At this posture of the case, Your Honor, it is clear that there are multiple issues of fact and that resolving the dispute by summary judgment is

inappropriate. Thank you.

THE COURT: All right, thank you, Mr. McDonald.

MR. SWAN: I would like to respond to a few comments. First of all, this comment doesn't really relate to the motion, but Mr. McDonald said, "Well, Matrix and my client are obviously affiliated companies," and I think that is an attempt to show that there are some underhanded dealings, some back door, back room negotiations. There are not facts to support that. Just because you have a director on one board of directors and a director on another board of directors that are independent board of directors, does not mean they are affiliated. There is just no evidence to support that, so I really object strenuously to that kind of statement.

It is clear that the defense to the enforcement of the note is fraudulent inducement based upon the statement, "It has not been relet. The premises are vacant." That is what they are now claiming. But they have never said that is a material misstatement. As Mr. McDonald uses his hypothetical, I will too, that there is a continuum of statements. Let's say my client said, "The moon is made out of cheese." Well, they may believe that. They may have taken that as true, but that doesn't make it material as to the negotiations.

THE COURT: But weren't they negotiating to

relieve themselves of potential future liability -- potential liability for future rents that they would not be paying?

MR. SWAN: Yes, they were. But whether or not there is a prospective tenant, I am not sure makes that statement material in light of the numbers that everybody is talking about. What that question really goes to is implicitly, I believe they are saying, "Had I known there was a new tenant, I would have found out how much they were paying. I would have been able to calculate how much my future liability would have been, and thereby made a more informed decision than I was making now." I think that is implicitly what they are stating; but the facts are they were only agreeing to pay $3,100 more than what they owed. And that is just not material.

In fact, there is no evidence that there was ever a duty to tell them that there was a new tenant. There is no evidence of when these negotiations that Mr. Floor talks about took place. He says in his affidavit they didn't take place until late November, 1988. We have submitted a document on Gump & Ayers' letterhead that says negotiations are taking place in October of 1988. So I think the documentary evidence is much more probative to that issue than what his conclusionary statement is and his recollection. But it is just not

material and here is the reason why. There is a case very close to this "Sugar House Finance vs. Anderson," which we cited in our memorandum. It is a case that was decided on a Motion for Summary Judgment. The Court enforced a Settlement Agreement. It was between a debtor and a creditor. In this case the creditor wanted to get out of the Settlement Agreement because he found out the debtor had more assets than the debtor disclosed, and the Court wouldn't let them do that, and the Supreme Court wouldn't let them do that. It says, "Misrepresentation may be made either by affirmative statement or by material omission where there exists a duty to speak. Such a duty will not be found where the parties deal at arm's length and where the underlying facts are reasonably within the knowledge of both parties. Under the circumstances, the plaintiff is obliged to take steps to inform himself and to protect his own interest."

There is no allegation that the defendant here has complied with that duty. It says, "In the present case plaintiff alleges fraud both in the defendant's failure to state that he owned property in question and in his failure to disclose the proposed sale thereof." And the Court found so what? The creditor could have found those things out had he known, and it just wasn't material to resolution of a dispute.

I think this Court, if you are going to deny the Motion for Summary Judgment, are going to have to make a finding that that statement that they allege was made was material to the decision; but they have made no showing of materiality. And the law is they have to show that. They can't allege, "Oh, I would have changed my mind." That is hindsight. They have to show that there was a definite decision-making process and how it would have affected that decision-making process. They haven't alleged that. The law is quite clear that fraud in the inducement to feed a Motion for Summary Judgment must be pled with particularity and must come forth with clear and convincing evidence, and they have not done either of those.

And if I understand you correctly, you are saying the standard they have in this context is clear and convincing?

MR. SWAN: That is correct.

THE COURT: Even in opposition to a Motion for Summary Judgment?

MR. SWAN: That is correct, and we have cited cases that hold that way directly. And in fact, the U.S. Supreme Court says that in opposing Motions for Summary Judgment, the defendant must come forth with evidence that meets their burden of proof in order to defeat a

Motion for Summary Judgment if they have had ample time for discovery. Now this somehow goes back to their question, "Oh, we sprung this Motion for Summary Judgment on them." We did not. We responded to their discovery. We waited more than a month after we responded to their discovery to file a Motion for Summary Judgment.

If this Court is not going to grant the Motion for Summary Judgment, and allow them to amend their pleadings and add this counterclaim and add the other defenses that they have made, then I think my client should be awarded its attorney's fees and costs for having gone through the exercise of filing a Motion for Summary Judgment, not knowing that they were going to suddenly raise all of these additional allegations after they have gone through their first set of discovery.

Mr. McDonald makes a lot out of his Rule 11 obligations. Well, he did his discovery. He didn't choose to file an amended answer or counterclaim until after the Motion for Summary Judgment was filed, and he had plenty of time to do so.

So I think my client has been prejudiced by that and that is why we have moved to not allow the amendment and some other things, moved for protective orders to try to focus that we were following things in good order, allowing plenty of time for the defendant to

be responsive to this lawsuit, and then they have tried, to what we think is muddy up the water, by raising a lot of these non-issues which are really not material to try to make this lawsuit expensive. So that is why there seems to be so many motions pending in this case.

THE COURT: Mr. McDonald, you don't technically have the last word, but is there anything else you would like to say now?

MR. MCDONALD: I would just submit, Your Honor, I can't conceive of anything more material in this situation than the statement, "The premises have not been relet." I don't think -- The materiality is so apparent there that counsel's argument that we have to tell the Court the obvious, is somehow an omission or failure of a burden of proof. That is a conclusionary finding of a trier of fact, but that is a material fact because they said, "You give us $20,000 and we will let you off the hook; but by the way, the premises are already relet and we are not going to lose a dime." I think is about as material as you can get.

With respect to muddying the water, that is the first time I have ever heard that the facts of the situation are muddying up the issue. We merely had restraint and have now submitted the true facts supported by affidavits. I will submit it.

THE COURT: Mr. Swan, you do have the last word, so --

MR. SWAN: Again, he has raised the issue that it is material because they believed they would not have owed any money. That fact is not before the Court. In fact, the affidavits clearly show that my client was still losing money after the Settlement Agreement. And so they try to make it material by saying that they wouldn't have owed any money but that is just not the case. The uncontroverted facts are, and there is a long calculation in Mr. Lloyd's affidavit of the rent differential. It was leased at a less square footage rate, that they were losing money. And so they were filling their duty to mitigate.

And the reason I say muddy up the water is, it seems incongruous to me that a party can say, "We weren't relying on any of our representations and we had advice of counsel." But now when we are asked to pay, "Oh, by the way, we did rely and we want to make that the defense and make that an issue."

Now I think also in executory courts, the law is quite clear that if this Court were to find that this executory court was induced by fraud and it is voidable, then that opens up the defendant to potential liability under the lease because it is executory in nature by its

very terms if it is not completed until paid in full. So that whole Pandora's box would be opened up. I am not suggesting the Court should not open that up, but the Settlement Agreement was very clearly designed to try to liquidate an amount, and it really didn't make a difference based upon its own terms about whether the premises were relet or not.

THE COURT: All right. Thank you, counsel.

(At this point the Judge gave her ruling which has already previously been transcribed.)

* * * * *

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, DOROTHY L. TRIPP, C.S.R., do hereby certify:

That I am one of the Official Court Reporters of the Third District Court of the State of Utah.

That on Friday, January 10, 1992, I reported the testimony and proceedings, to the best of my ability on said date in the above-entitled matter, presided over by the Honorable Anne M. Stirba in the Third District Court of Salt Lake County, State of Utah; and that the foregoing pages, numbered from 1 to 34, inclusive, contain a full, true and correct account of said proceedings of hearing to the best of my understanding, skill and ability on said date.

Dated at Salt Lake City, Utah, this 26th day of April, 1993.

Dorothy L. Tripp

Dorothy L. Tripp, C.S.R.
Official Court Reporter
License No. 00074-1801-8

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * * * *

UNION PARK ASSOCIATES Plaintiff, vs. GUMP & AYERS REAL ESTATE, INC. Defendant.	Transcript of: JUDGE'S RULING Case No. 900906725

The above-entitled cause of action came on regularly for hearing before the Honorable Anne M. Stirba, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake County, Utah, on Friday, January 10, 1992.

APPEARANCES

For the Plaintiff: MARK S. SWAN
RICHER, SWAN & OVERHOLT
311 South State #350
Salt Lake City, Utah

For the Defendant: ROBERT M. McDONALD
McDONALD & BULLEN
455 East 500 South #200
Salt Lake City, Utah

FRIDAY, JANUARY 10, 1992

JUDGE'S RULING

THE COURT: All right. Thank you, counsel. I appreciate your arguments and the thoroughness in which you presented this this afternoon. I have considered this and, as I told you before, I have read the memoranda and voluminous pleadings that have been submitted on this case.

This is the Plaintiff's Motion for Summary Judgment to enforce a settlement agreement that was entered into by the parties at the time that the defendant terminated the lease unilaterally. Frankly, I have given the fraud claim considerable thought. I am frankly persuaded that if any misrepresentations were made, that under these facts the defendant has not shown by clear and convincing evidence that the misrepresentations were material for the reasons argued by the plaintiff's counsel, but here and in its pleadings.

This is a rather unusual kind of a ruling, I think, in these kinds of actions but there is a burden on the defendant to show by clear and convincing evidence that fraudulent misrepresentations were made or omissions in the face of the duty to speak. I am not convinced that there were misrepresentations, but there is some evidence to the contrary. And so on that point, plaintiffs would not be entitled to summary judgment alone. But it seems to me

that that, under all of the facts, including the contractual obligations which the defendants submit they did owe at that time, both having already accrued and what they were exposed to, and in light of the damages amounts that the plaintiffs did suffer as a result of the termination of the lease, and cost associated with re-letting, and all of that, when you look at all of the numbers that are involved, I just don't see this as material. I don't think that the defendants have met their burden of showing by clear and convincing evidence that there was fraud in the inducement in this action. For that reason then, I am not inclined to accord that view and would rather on the issue of liability grant summary judgment in favor of the plaintiff.

Now, there are contested issues as to the amount of interest owing, whether it is ten percent or ten percent per annum; and we haven't addressed that today. Also, if there is any dispute about attorney's fees, we will need to deal with that as well. So, counsel, I would like you to address the issue of damages at this time, procedurally, just how you would like the Court to resolve that.

MR. SWAN: Well, to be frank, Your Honor, I have not done any legal analysis of construction of interest rates when it is not -- when the phrase "per annum" is not set forth in the note. It would be my suspicion because of my practice, and I do this quite a bit, that that is a

phrase or an understanding of the note that the Court can infer, otherwise it is not sensical. Calculate interest on some kind of period. And I think we can show by the way that the defendants were calculating their own payments and by their own affidavit, they show how much they were paying. They were calculating it on a per annum basis. For instance, they owed their first payment so many months after the execution of the note. They paid the principal amount due, plus the accrued interest portion and that calculation is quite simple. It was ten percent per annum is what they were using. And so, I think that there is a clear showing by the conduct of the parties that there was a meeting of the minds that that meant a yearly basis.

If the Court would like me to brief how the Court is supposed to construe that, I can do the calculation right here and show you that that is how they construed it themselves based upon their own affidavit.

THE COURT: I don't know that we are going to get this issue resolved today and I don't know on what other points the defendants might disagree with the amount of damages. I think the better way to handle this, unless Mr. Mc Donald has got a better idea, is to submit your judgment on the issue of liability and set forth the amount of damages. And if Mr. Mc Donald objects to that, then we can have a hearing on that. Unless, Mr. Mc Donald, do you

have another suggestion?

MR. MC DONALD: The problem that I have, Your Honor, and it is inherent in the ruling that has been made by the Court and that is this: that the case has been presented as a case for summary judgment on a note. It has been decided on the basis of something that I didn't regard as being an issue and that was their calculations of what would be due without the note. That isn't an issue that was raised to be addressed. There were substantial factual disputes with the manner in which they claimed this. When you say there is only 3,000 in dispute --

THE COURT: No, no. I am not talking about that. I am not talking about the amount of the note itself. The issues that I really see that remain unresolved as to damages, are the interest figure, attorney's fees and costs. I don't see, you know, the basic underlying amount of the promissory note as remaining at issue.

MR. MC DONALD: Well, in light of the Court's decisions, it is not. The problem I had with it is, and I guess maybe -- now that I hear the Court's basis for non-materiality, it is based upon a finding that their calculation of what would be due without the note are correct.

THE COURT: That I used as an overall context. However, my ruling, my finding, was assuming there were

misrepresentations that were made, they are not material to the promissory note and the negotiations of the promissory note. And I find that because I felt that the defendants has by law the burden of proof, rather heavy burden of proof to show by clear and convincing evidence that they were in fact material, and I didn't see that that burden had been met.

Now the only issues that I do see that remain to be resolved are whether the interest was per annum and as to that, I didn't focus on that as we prepared here today. But there is obviously contention about who drafted this note and therefore, you know, this may come down to a ruling of construction, you know, as to who drafted the note and whether it was ten percent or --

MR. MC DONALD: It is parol evidence.

THE COURT: Maybe it is parol evidence, but I think that that issue is an issue that remains in my mind and then the issue of attorney's fees and costs. Those are the only issues that I see that remain.

MR. MC DONALD: Well, I can't conceive of how we can resolve those issues on summary judgment. So maybe we can attempt. I will certainly attempt to resolve this in light of the Court's ruling so we don't have to come back, but I can't conceive of how we can in this circumstance start resolving factual disputes.

THE COURT: Well, I am just looking for a procedural mechanism in which to resolve it. That is all. And if it is something that is reserved for trial because it can't be resolved in a summary fashion, then so be it because that is the way it will come out.

However, I would like to address at least a couple of the other motions. I think with regard to the issue of damages, I am granting summary judgment on the issue of liability as requested in plaintiff's motion. I am not resolving today, I am not ruling on the issue, deciding one way or the other on the issue of damages. And that issue remains alive. If you want to make a specific motion on the issue of damages, attorney's fees and costs, then you may do so, or if you are not able to resolve that by discussions between the two of you, otherwise it is considered preserved for trial if no motion is filed.

And with regard to the other pending motions, as to the Motion to Amend, implicit in my ruling is that I would deny the Motion to Amend to allege a counterclaim setting forth fraud as a cause of action.

MR. MC DONALD: You are denying the Motion to Amend?

THE COURT: That is correct, and in so doing I don't find that it was unreasonably -- or rather, that it was untimely. I think that it was early enough in the

lawsuit, but rather I looked to the substantive issue of fraud and it doesn't make any sense to me that having found that -- I don't see that when the issue has been framed as to the claims of fraud, that there has been clear and convincing evidence to show, that it would make sense then to turn around and say, "Okay, now, amend your Answer and include the counterclaim on this very issue that I just said wasn't clear and convincing at this point." That is why I am denying the Motion to Amend.

MR. MC DONALD: The problem I have, if the Motion to Amend is not granted, then fraud isn't before the Court on summary judgment.

MR. SWAN: It is in the way of the affirmative defense on how to defend a motion.

THE COURT: Well, you defend it on that basis and I considered it in that context. It was a pending motion I reserved on that. I indicated I had read all of the pleadings about it. Motion to Amend is denied.

Now, are there any other motions that we need to deal with today?

MR. MC DONALD: I think the others would be moot now.

MR. SWAN: I believe so, Your Honor. The Motion to Strike the Affidavit of John Parsons, that was submitted in the support of their opposition memorandum. Our motion

for Protective Order is probably moot since there is no need for discovery. Just so the Court knows, we have answered that discovery belatedly to try to get this matter cleaned up and maybe settle this case. So it was made moot by our own response to their discovery except for maybe their response for attorney's fees. I don't know.

Motion to compel, I think that is made moot. They had a Motion to Strike our supplemental affidavits and I think the Court has allowed those appendix implicit in its ruling and been willing to consider those. I think those are all moot.

THE COURT: Very well. Is there anything else then, counsel?

MR. MC DONALD: Will you prepare an Order? (Talking to Mr. Swan.)

THE COURT: Yes. Mr. Swan, I want you to prepare a judgment and Order in accordance with the ruling this afternoon, and do you need a scheduling in case?

MR. SWAN: For a trial?

THE COURT: No, I wouldn't set it for trial. Just in terms of a discovery cut-off, if you are not completed and cut-off for any other motions.

MR. SWAN: Well, it would be my hope that based upon this Court's ruling of liability, that Mr. McDonald and I can get together and resolve this issue on damages.

If his client still wants to fight, then maybe we will do those. I don't know what the position is going to be.

THE COURT: Why don't you do this-- Oh, go ahead, Mr. Mc Donald.

MR. MC DONALD: Why don't we address that? Obviously, neither of us have had an opportunity to think in the new context of the case. I would suggest that if in fact we are unable to agree and you think it is a summary judgment issue, we should file a supplemental or a different motion so we can now address what we didn't know we were going to have to address today. In the meantime, we will attempt to resolve it in light of the Court's ruling reserving all appeal rights and so forth so we can bring it to a conclusion.

THE COURT: Well, do you see the need to do any additional discovery or you are just not prepared to analyze that?

MR. MC DONALD: Well, I don't think we will know that until we can determine whether we can resolve the damage issue. If the damage issue can be resolved, the case is over unless there is an appeal filed.

THE COURT: Why don't you do this. If you see the need for -- if you are not able to resolve it satisfactoriy between yourselves, then why don't you on or before December 31st to file a proposed scheduling --

MR. MC DONALD: You mean January?

THE COURT: What did I say?

MR. MC DONALD: December.

THE COURT: I am looking at January and said December. File by January 31st a proposed schedule and all I want you to include in that is discovery cut-off and about two weeks after that a motion -- a cut-off for any other dispositive motions you might have. And about a week after that, if no dispositive motions are filed, then a date by which one of you would file a Certification of Readiness for Trial. And at that point, then we will have a scheduling conference and schedule a final pretrial and trial. But don't do that unless you find it necessary. In other words, if you can't resolve it otherwise.

MR. SWAN: One of my concerns, Your Honor, is I am going to -- cause I don't take as copious of notes as I should when you rule, I am probably going to require a transcript of the ruling portion of this hearing, so I can make sure I have got everything in the Order. I don't know how long it will take to get something in order to present something to Mr. Mc Donald.

THE REPORTER: I can do it right away.

THE COURT: Dorothy says she can do it right away.

MR. SWAN: Then we should be able to meet that deadline.

THE COURT: If you can, fine. I am not so concerned about January 31st as I am if you -- if you are not able to resolve it, then let's get a scheduling in place and then we can get this matter resolved.

MR. MC DONALD: In light of the unknown, why don't we just have it at such a time as we find we are unable to negotiate, if we can. We will just file for a scheduling conference and will go from there.

MR. SWAN: My anticipation if we can't agree on this interest rate issue, then I will file a Motion for Summary Judgment on that issue. I am pretty confident I think I know what the law is.

THE COURT: All right. The final ruling will be this, in order to give you a little more time, if you are not able to resolve this then by February 14th, and that is more than a month down the road, if you are not able to resolve it by then, then submit a proposed schedule if you can agree on one. Okay?

MR. MC DONALD: Otherwise, move for a scheduling conference?

THE COURT: Well, no, just submit your respective one. I don't think we need to have another hearing about that. I am just looking for the easiest way to get that done.

MR. MC DONALD: All right, thank you, Your Honor.

THE COURT: Thank you.

* * * * *

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, DOROTHY L. TRIPP, C.S.R., do hereby certify:

That I am one of the Official Court Reporters of the Third District Court of the State of Utah.

That on Friday, January 10, 1992, I reported the testimony, and/or proceedings, to the best of my ability on said date in the above-entitled matter, presided over by the Honorable Anne M. Stirba in the Third District Court of Salt Lake County, State of Utah; and that the foregoing pages, numbered from 1 to 11, inclusive, contain a full, true and correct account of said proceedings of Judge's Ruling to the best of my understanding, skill and ability on said date.

Dated at Salt Lake City, Utah this 14th day of January, 1992.

Dorothy L. Tripp, C.S.R.
Official Court Reporter
License No 74-1801-8

EXHIBIT "D"

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * *

UNION PARK ASSOCIATES, a Utah Limited Partnership,	
Plaintiff,	Case No. 900906725 CV
v.	Transcript of:
GUMP & AYERS REAL ESTATE, INC.,	JUDGE'S BENCH RULING
Defendant.	on Plaintiff's Motion for Summary Judgment

* * *

BEFORE THE HONORABLE JUDGE ANNE M. STIRBA

Salt Lake City, Utah

Monday, November 30, 1992

APPEARANCES

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Salt Lake City, Utah 84111
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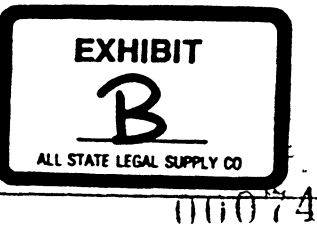


MONDAY, NOVEMBER 30, 1992; P.M. SESSION

JUDGE'S BENCH RULING

THE COURT: Thank you, counsel.

I reviewed the motions and all the memoranda that have been submitted and the affidavits, and I am prepared to rule at this time on the motions. There are two motions before the Court: The Plaintiff's Motion for what is essentially a partial motion or a Motion for Partial Summary Judgment and the Defendant's Motion for Partial Summary Judgment.

The specific issue first to be resolved is the construction of the interest rate in the promissory note. Now, parties to a contract such as this are not entitled to a better contract than the one that they entered into. And having said that, it is incumbent upon the Court to make a first determination that in a contract dispute whether the underlying contract, in this case the promissory note, is clear and unambiguous.

And in this particular case, the language that is relevant to the interest rate makes no mention of a per annum interest rate. It doesn't make mention of a flat rate interest rate either. I don't think there is any ambiguity about that contract in and of itself, just that it's missing a term.

It seems to me that in looking at that, and also looking at the other language, "interest to accrue," or the

accruing language only makes sense if this contract was to provide for per annum interest rate. So then you have one part of the contract, the note, making reference to "accruing." It does only make sense if there is a per annum rate, I believe, as a matter of law, and yet there is no mention of whether the rate is to be a flat rate or an accruing rate. If it were a flat rate, then you might even have an ambiguous note, but that's not really the issue before the Court.

The plaintiff relies on the statute which sets forth what is to happen when parties, public or private, to deeds and other documents mentioned in that have not mentioned whether a rate -- how a rate is to be calculated, at least when there is no rate that's mentioned. And I paraphrase in very rough fashion the statute.

As I look at the statute, in looking at this promissory note, it appears to me that the plaintiff's position is well taken. That the statute does control in this case, does provide the Court the justification for inserting a term in a contract. The parties are not entitled to a better contract than the one that they entered into, and generally courts do not imply terms or read terms or add terms to a contract. But in this case I think the legislature has done just that.

And therefore, for those reasons and the other reasons set forth by Mr. Swan on behalf of the plaintiff, I am

going to grant partial summary judgment in favor of the plaintiff and deny that aspect of summary judgment on behalf of the defendant.

Then as to the question of late fees and attorney's fees, the contract provided for the payment of late fees when payments were, in fact, late. And it appears to me as I look at that, that the contract is clear and unambiguous, that late fees were to apply. And finally with regard to attorney's fees, clearly attorney's fees are appropriate for enforcing the rights under that promissory note. In this case the plaintiff has prevailed on the issues that it has advanced. And consistent with that provision, the Court also grants summary judgment on the issue of attorney's fees.

And there has not been -- well, in any event, for those reasons I am going to grant summary judgment as prayed for by the plaintiff and deny it as to the defendant.

Is there anything I have overlooked?

Counsel.

MR. McDONALD: In preparing the order I take it that we can insert that, so there is no question as to the basis of the Court's decision, that this decision was made out of the consideration of the extrinsic evidence.

THE COURT: That is correct.

MR. SWAN: Your Honor, you have called it a partial summary judgment. I believe this resolves all the issues.

It's only partial because there was a prior partial, but it's a final judgment as far as all the issues.

THE COURT: That's my understanding, Mr. Swan. I want you to prepare an order for this Motion for Summary Judgment. I want you to prepare a judgment consistent with all these rulings.

Now, you do not have to prepare findings of fact. That's not required by law. Sometimes you get into more arguments over what was found and what wasn't. I do want to say that when I make a ruling from the bench, I try to hit on the highlights of the bases for the Court's decision. I don't mean those remarks to be all-inclusive. And I have now adopted the practice of at least trying to remember to say, "and for other reasons set forth," so that those reasons that are consistent with the Court's ruling can also be considered. But I did find those arguments of the plaintiff persuasive under the facts of the case and in looking at that note and that statute.

MR. SWAN: Thank you, your Honor.

THE COURT: Thank you, counsel.

(This concludes the Judge's Bench Ruling.)

* * *

C E R T I F I C A T E

STATE OF UTAH)
:
COUNTY OF SALT LAKE)

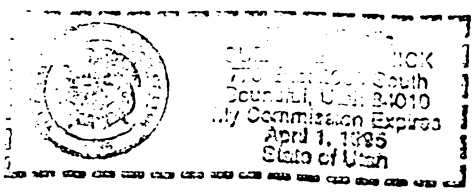
I, SUZANNE WARNICK, CSR, RPR-CM, do certify that I am a Certified Shorthand Reporter, Registered Professional Reporter with the Certificate of Merit, and a Notary Public in and for the State of Utah.

That at the time and place of the proceedings in the foregoing matter, I appeared as the court reporter in the Third Judicial District Court for the Honorable Judge Anne M. Stirba and thereat reported in stenotype all of the proceedings had therein.

That thereafter, my said shorthand notes of the Judge's Bench Ruling were transcribed by computer into the foregoing pages; and that this constitutes a full, true and correct transcript of the same.

WITNESS MY HAND AND SEAL in Salt Lake City, Utah on this, the 23rd day of January, 1993.

Suzanne Warnick, CSR, RPR-CM



My commission expires:
1 April 1995